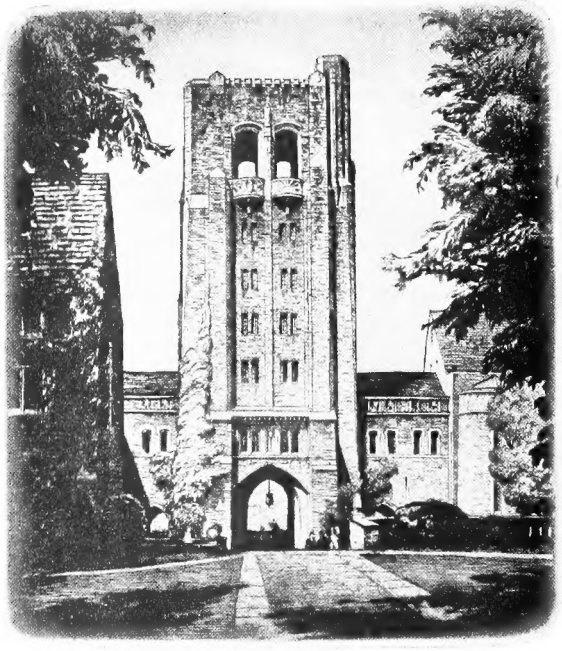


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A TREATISE

ON

THE AMERICAN LAW

OF

ATTACHMENT

AND

GARNISHMENT

A COMPLETE STATEMENT OF THE

GENERAL PRINCIPLES APPLIED BY COURTS OF REVIEW AND OF THE COMMON RULES GOVERNING THE PRACTICE, UNDER ALL STATUTES

BY

ROSWELL SHINN

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And Author of Shinn's Pleading and Practice

IN TWO VOLUMES

VOLUME I

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PREFACE.

Attachment, including garnishment, has no precedent in the English common law. It is an outgrowth wholly of active mercantile life, from the demands of merchants, the provisions of statutes, and the sanction of the courts. Every state of the American Union has enacted laws upon the subject. These statutes often differ in minor particulars, but since they are designed to produce the same result in the same way, the adjudicated law is an interwoven net-work of common law rules affording a substantial and summary (though extraordinary) redress against the wrongs of intentionally delinquent debtors. The similarity of attachment statutes makes unity of treatment possible. This is also desirable because the adjudicated law has an extra-territorial force not contained in the attachment statutes themselves. The decisions of courts have a universal application and power. Therefore an effort has been made herein to state the rules and principles of construction and procedure, of what may be appropriately termed the AMERICAN LAW OF ATTACHMENT, including Garnishment, as the courts of the United States unite in interpreting and stating it, and no effort has been made to set out the separate *statutory provisions*, since the practitioner always has them in hand.

The work has been prepared to supplement the statutes of every state without being a laborious reiteration of the statutes of either.

It has been the purpose, by systematic arrangement of the subjects in their natural order, by minute analysis of each subject into sections and paragraphs, and by a full and complete index, to place the whole subject of attachment in such

form that any rule or principle can be easily found; and, when found, be susceptible of ready application.

All the succeeding steps, from the contemplation of the proceeding in attachment and garnishment to the final review on appeal, are treated in consecutive order. Minute attention has been given to the force and effect of the lien, and to priorities of the lien over other processes and deeds, together with the intervention and interplea of strangers claiming an interest in the attached property. There is also a somewhat lengthy chapter given indicating the extent to which judgment in garnishment will protect the garnishee from other suits.

The rules relating to attachment by seizure, being statutory, are arbitrary, rendering a statement of them necessarily imperious, but in relation to garnishment, in which a third party is brought, whose rights are guarded by the common law, the statement of the rules and principles governing in such cases will be found to be more philosophic and deductive.

A statement has been made of the general principles which prevail throughout the United States, with rare exceptions, and where a diversity of judicial opinion has been found, that which is based upon logical reasoning has been given the preference and the conflicting opinion thereafter stated, the author believing that correct reasoning must eventually prevail in all cases.

March 1, 1896. ROSWELL SHINN.

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CHAPTER I.

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3. (b) Is an ancillary or provisional remedy.
4. (c) Has a twofold nature when there has been personal service.
5. (d) Is in the nature of a proceeding *in rem* when there has been no personal service.
§ 6. (e) Has no extra-territorial effect without personal service.
7. (f) Is strictly a proceeding at law.
8. (g) Is wholly statutory, in derogation of the common law, and its rules will be strictly construed.
9. (h) Is an evolving remedy.
10. Purpose of attachment—to create a provisional lien.
11. The purpose and result of the many state statutes are uniform.

§ 1. Origin of the remedy.—The attachment laws of the United States, while unlike in many particulars, are yet so similar as to show a common source and permit of general classification and some united treatment under the generic name of American Law of Attachment.

In seeking the source of our attachment law we find an ancient Roman practice, whereby the effects of a debtor, who had secreted himself at home to elude prosecution, were appropriated to the satisfaction of his debts, three efforts having been made to summon him and he having not appeared.[1] This is supposed to be the origin of what we find later to have been the custom of foreign attachment in London.[2] A strange feature of the London custom, however, was that while the "plaint" must be returned *nihil* before the plaintiff could have garnishment, yet the very essence of the custom was that the defend-

1. Adams Roman Antiquities (Wilson), 194.

2. Locke on Foreign Attachment, XVI.

ant should not have notice. If the practice of summoning the defendant at the commencement of the suit ever prevailed under the custom, it was probably found to interfere with the advantage intended to be gained by the attachment, and was therefore discontinued. The only notice the defendant had of the proceeding was what he derived through the attachment itself.[1] In this is the greatest distinction between the old London custom and the American attachment law. Nevertheless, and notwithstanding the local and limited character of this ancient London custom, it is conceded to be the immediate source of the various attachment laws of the United States.[2]

The enlargement upon this narrow source, by each of the law-making powers of the many state sovereignties into which our broad land is divided, has naturally led to the establishment of laws dissimilar in many minor particulars. And yet, because of a general similarity of circumstances arising from like business transactions in each, and because of unrestrained transit and unprecedented interstate commerce resulting in unity of interest, we have in the United States one general tendency in the attachment acts of the several states, and one general trend to all judicial administration.

The fact that the judiciary of each state looks to the judicial administration of similar laws in other states renders some general consideration of the many attachment laws possible. Therefore the judicial administration of the attachment laws—the union of the specific laws into a generic law as administered by the courts—will be considered in the following articles, omitting therefrom (in so far as the same may be done without causing obscurity) the special statutory enactments; because such statutes are necessarily local and of little utility out of the sovereignty where alone they obtain.

§ 2. Nature of the remedy—(a) It followed imprisonment for debt, to compel appearance.—At the time the London cus-

1. Locke on Foreign Attachment, 12; Ashley on Attachment, 9.

2. Further as to the London custom see Mr. Bohun's "Privilegia Londini; or the Rights, Liabilities, Privileges, Laws and Customs of the City of London;" also Drake on Attachment, 13.

tom obtained, attachment under it was a co-ordinate remedy with imprisonment for debt. The original object of such attachment proceeding was to attach the defendant's property instead of his body, to compel his appearance by sufficient sureties to answer the plaintiff's demand.[1] In this country, before the abolishment of imprisonment for debt, an attachment could only be levied upon the goods of the defendant to compel him to give bail when he could not be arrested by ordinary process.[2] After the abolishment of imprisonment for debt, attachment was at first said to be only a process to compel the appearance of a defendant whose person could not be reached by the process of court.[3] It was for the purpose of seizing his property to compel his appearance when from non-residence or flight he was beyond the process of the judicial tribunal, and on failure of appearance, by replevin or otherwise, to apply his property to the satisfaction of his debts. It was considered to be an extraordinary and not an ordinary writ, and it was not even then intended to be used when the debtor was within the reach of some ordinary process.[4]

When compared with imprisonment for debt, which preceded it, attachment is not a proceeding in derogation of the principles of the common law, but rather in mitigation of its severity.[5]

In later years attachment has been considered not a proceeding to bring the defendant into court, but a means by which the plaintiff may have execution against the thing attached. It is not to compel the payment of debts, but to make the property of absentees, and others, liable for their debts.[6]

§ 3. (b) **It is an ancillary or provisional remedy.**—An at-

1. Ashley on Attachment, 11.

2. Terrill *v.* Rogers, 3 Hayw. (Tenn.) 203.

3. Barney *v.* Patterson, 6 Har. & J. (Md.) 182; Perkins *v.* Norvell, 6 Humph. (Tenn.) 151; Boyd *v.* Buckingham, 10 Humph. (Tenn.) 434; Fitch *v.* Ross, 4 S. & R. (Pa.) 557; Albany City Ins. Co. *v.* Whitney, 70 Pa. St. 248. Compare Hailman *v.* Wilson, 1 Pa. Law Jour. Rep. 189; Duffy *v.* Owings, 1 Pa. Law Jour. Rep. 33.

4. Risewick *v.* Davis, 19 Md. 82; Cheatham *v.* Trotter, Peck (Tenn.) 198.

5. Barney *v.* Patterson, 6 Har. & J. (Md.) 182.

6. Robinson *v.* National Bank, 81 N. Y. 385; Myers *v.* Farrell, 47 Miss. 281.

tachment is not considered to be an independent proceeding, but one merely in aid of an action commenced concurrently with, or before, the proceedings in attachment. The object of it is to secure a lien upon the defendant's property to secure the payment of any judgment which the plaintiff may recover in the main suit against him. It is merely auxiliary to the main action to secure property of the defendant to be applied in satisfaction of the judgment of the plaintiff, providing he shall be able to establish his claim.[1] The process of attachment is usually preceded by, or issued concurrently with, one of the original writs incident to personal actions, such as summons or capias.[2] And when such leading writ is required, the issuance of an attachment before the summons has been issued will render the attachment void.[3] In a few states, however, the issuance of such a leading writ before a writ of attachment may be dispensed with; but even in such states an attachment is considered to be the blending of two proceedings; one strictly *in rem* and the other *in personam*. And the writ is employed as a summons as well as an attachment. It is then twofold and has the same force and effect as two separate writs in other cases. If it is only personally served upon the defendant it will justify a personal judgment against him and a general execution may be levied upon his property as in other cases *in personam*. If it is served solely as an attach-

1. Excelsior Fork Co. *v.* Lukens, 38 Ind. 438; Fechheimer *v.* Hays, 11 Ind. 478; Bundrem *v.* Denn, 25 Kan. 430; Furman *v.* Walter, 13 How. (N. Y.) Pr. 348; McKinney *v.* Collins, 88 N. Y. 216; Toms *v.* Warson, 66 N. C. 417; Marsh *v.* Williams, 63 N. C. 371; Mixer *v.* Excelsior, etc., Co., 65 N. C. 552; Swartz *v.* Lawrence, 12 Phila. (Pa.) 181; Maxwell *v.* Lea, 6 Heisk. (Tenn.) 247; Bivins *v.* Matthews, 7 Baxter (Tenn.) 256; Frankenheimer *v.* Slocum, 24 Ala. 373; Moore *v.* Sheppard, 1 Metc. (Ky.) 97; Duncan *v.* Wickliffe, 4 Metc. (Ky.) 118; Bray *v.* McClury, 55 Mo. 128; Eagan *v.* Lumsden, 2 Disney (Ohio) 168.

2. Leonard *v.* Stout, 36 N. J. L. 370; Roberts *v.* Dunn, 71 Ill. 46; Walker *v.* Cottrell, 6 Baxter (Tenn.) 257; Grubbs *v.* Colter, 7 Baxter (Tenn.) 432.

3. Hall *v.* Crogan, 78 Ky. 11.

Since the date of the summons is not a necessary part of it, an attachment is not rendered irregular and void because its date is prior to the date of the summons. The fact that the summons existed at the time the attachment was made may be shown by evidence *aliunde*. Smith *v.* Walker, 6 Rich. (S. C.) 169.

ment writ the proceeding will then be strictly *in rem*, like cases in which two writs were issued and no service of summons had. And when both personal service and seizure is made, the remedy will not be restricted to a special execution against the attached property, but a personal judgment may also be entered and a general execution issued against other property of the defendant which has not been seized on attachment.[1] Furthermore, when it is required that a suit *in personam* be pending in order that the provisional remedy of attachment may be made available, it is not always necessary that the personal writ be served; for where the controlling statute makes the issuance of a summons the commencement of a suit, the writ of attachment may be issued immediately after the issuance and before the service of the summons. The principal action *in personam* having been begun, the provisional character of the attachment is preserved, the requirements of the statute are thereby satisfied and a seizure of property thereafter will bring it within the jurisdiction of the court, although no personal service be ever made of the writ.[2]

§ 4. (c) **It has a twofold nature when there has been personal service.**—When there has been both a personal service and a seizure of property on a writ of attachment, the suit against the defendant assumes a double character. It becomes a proceeding *in rem* against the property levied upon, and also becomes an action *in personam*. This action *in personam* is independent of the attachment, and though the plaintiff may fail as against the property, he may, nevertheless, recover a personal judgment.[3] And because of the independent character of the personal action, a plea in abatement to the writ, or any other denial of the existence of cause for attachment, will not prevent the rendition of judgment by default and the issuance

1. Bower *v.* Town, 12 Mich 229; Conn *v.* Caldwell, 6 Ill. (1 Gilman) 531; Erwin *v.* Heath, 50 Miss. 795; Magee *v.* Beirne, 39 Pa. St. 50; Elliot *v.* Stevens, 10 Iowa 418.

2. Wallace *v.* Castle, 68 N. Y. 370; Allen *v.* Meyer, 73 N. Y. 1; American Exchange Bank *v.* Voisin, 44 Hun (N. Y.) 85.

3. Bishop *v.* Fennerty, 46 Miss. 570; Hills *v.* Moore, 40 Mich. 210.

of a general execution against the property of the defendant.[1]

Another incident of the twofold nature of the remedy by attachment is, that where there has been an attachment of the defendant's property, and the defendant has procured the re-

1. Schulenberg *v.* Farwell, 84 Ill. 400.

NOTE 1—TO WHAT EXTENT AN ATTACHMENT IS CONSIDERED TO BE A SUIT.—Although an attachment is deemed to be a proceeding in aid of a suit pending, it is in some senses itself a suit. An attachment sued out against a non-resident debtor is a "suit" within the meaning of the judiciary act of congress which gives exclusive jurisdiction to the district courts of the United States in all suits against consuls. Matter of Aycinena, 1 Sand. (N. Y.) 690.

And the suing out and levying of an attachment is such a suit that it may be pleaded in abatement or in bar of another suit brought to recover the same debt. Dean *v.* Massey, 7 Ala. 601; Monroe *v.* Castleman, 3 A. K. Marshall (Ky.) 399. It is a remedy, and, like every remedy, may be defeated by any act that bars or takes away the remedy or right to judgment under it. *Ex parte* Foster, 2 Story 131.

NOTE 2—TO WHAT EXTENT AN ATTACHMENT IS CONSIDERED TO BE AN EXECUTION.—While an attachment has not the same force as an execution—Reeves *v.* Johnson, 12 N. J. L. 29—its effect is in many respects similar to that of an execution. In fact, in Maryland, under the act of 1715, it was considered as an execution and governed by the same principles, and in consequence thereof an *alias* attachment could not be sued out before the first was returned, for the neglect of the sheriff to return the first afforded no presumption that it had not been served. Baldwin *v.* Wright, 3 Gill (Md.) 241. It was held in the same state in 1870 that it was not an execution within the meaning of the statute which provided that the goods and chattels of a lessee of land should not be seized on execution and removed therefrom unless the plaintiff in execution should render to the landlord the arrears of rent due to him from such lessee. Thomson *v.* Baltimore, etc., Steam Co., 33 Md. 312.

It differs also from an execution, in that it only becomes a binding lien from the time of the actual levy, while an execution binds from the time it comes into the hands of the officer. Stockley *v.* Wadman, 1 Houst. (Del.) 350; Shacklett & Glyde's Appeal, 14 Pa. St. 326.

It further differs from an execution, in that it only operates upon the right of the debtor existing at the time of the levy. No interest subsequently acquired by the debtor can in any manner be affected by the return thereof when none was in him at the time the attachment was made. Crocker *v.* Pierce, 31 Me. 177. But where the debtor has some interest in the property at the time of the levy, and the lien is thereafter perfected by the judgment, and a sale is made on execution issued thereon, there having been a personal appearance, the sale seems to pass not only the interest which the defendant had at the date of the levy of the attachment, but also whatever interest he may have subsequently acquired. Willis *v.* Pounds (Tex. Civ. App.), 25 S. W. Rep. 715.

lease of such property by executing an undertaking with sureties, such suit as a proceeding *in rem* is completely changed and it becomes a proceeding *in personam* as wholly as if it had been originally commenced by an ordinary summons, and no attachment had ever been sued out.[1] And the bond stands as collateral security for the general judgment and execution that may be obtained.[2]

§ 5. (d) **It is in the nature of a proceeding in rem when there has been no personal service.**—The nature and effect of the remedy by attachment, when no personal service has been made upon the defendant, is a subject that has received much consideration and many interpretations. It is a fundamental principle of justice, recognized and acted upon by all courts, that a party can not be deprived of, or his rights affected, without having an opportunity to assert and defend them; and that to bind a person by judicial sentence, he must be made a party to the proceeding and must be served with actual or constructive notice of the proceeding, or must voluntarily enter his appearance.[3] The seizure of the defendant's property in attachment and the publication generally required by the statute is deemed to be such constructive notice as to give the court jurisdiction of the thing seized. Hence, when there is a seizure of property and no personal service, the attachment suit, being founded upon constructive service, is essentially in the nature of a proceeding *in rem*, the possession of the *res* being necessary to the jurisdiction of the court.[4] And the judg-

1. Hill *v.* Harding, 93 Ill. 77; People *v.* Cameron, 7 Ill. 468; Buchman *v.* Dodds, 6 Ill. App. 25; Stix *v.* Dodds, 6 Ill. App. 27; Brenner Truck Co. *v.* Moyer, 98 Pa. St. 274; Albany City Ins. Co. *v.* Whitney, 70 Pa. St. 248; Gillespie *v.* Clark, 1 Tenn. 2; Shirley *v.* Byrnes, 34 Tex. 625; Parker *v.* Brady, 56 Ga. 372; Dierolf *v.* Winterfield, 24 Wis. 143.

2. Jones *v.* Gresham, 6 Blackf. (Ind.) 291.

3. Borders *v.* Murphy, 78 Ill. 81; Westerveld *v.* Lewis, 2 McLean (U. S.) 511; Judah *v.* Stephenson, 10 Iowa 493.

4. Bray *v.* McClury, 55 Mo. 128; Erwin *v.* Heath, 50 Miss. 795; Cooper *v.* Reynolds, 10 Wall. (U. S. Sup. Ct.) 308; Kilburn *v.* Woodworth, 5 Johns. (N. Y.) 37; Field *v.* Dortch, 34 Ark. 399; Pennoyer *v.* Neff, 95 U. S. 714; Myers *v.* Farrell, 47 Miss. 281; Ingle *v.* McCurry, 1 Heisk. (Tenn.) 26; Maud *v.* Rhodes, 4 Dana (Ky.) 145; Eagan *v.* Lumsden, 2 Disney (Ohio) 168; McCord & Nave Mercantile Co. *v.* Bettle, 58 Mo. App. 384.

ment and execution can effect no more than the subjection of the property seized.[1] When there has been a seizure and publication, both of which are necessary to confer jurisdiction, the defendant is considered to be in court to the extent that it may bind him by a judgment to the extent of the property seized. In other words, he is before the court for all purposes except the rendition of a general personal judgment. The state has power to assert jurisdiction over personal property situate within its territorial limits, even though the person of the owner be not within the jurisdiction of the court which renders the judgment.[2] The effect of this is that where the property seized, and the judgment obtained against the same, is insufficient to satisfy the plaintiff's demand against the defendant, a further suit must be brought upon the original cause of action; and the defendant will then have the right to set up and rely upon any defense he could have interposed had no suit or attachment ever been brought, or judgment therein recovered.[3] But while the action is considered in the nature of a proceeding *in rem* when there is no personal service, and remains so unless the defendant voluntarily appears, his appearance in the suit will then give it the nature also of an action *in personam* and will give the court jurisdiction to render a personal judgment and to issue a general execution against all of the defendant's property.[4]

§ 6. (e) **It has no extra-territorial effect without personal service.**—It is not only a universally recognized principle of

1. Clymore *v.* Williams, 77 Ill. 618; Hobson *v.* Emporium R. Est. and Manf. Co., 42 Ill. 306; Parsons *v.* Paine, 26 Ark. 124; Clark *v.* Holliday, 9 Mo. 711; Janny *v.* Spedden, 38 Mo. 395; Mayfield *v.* Bennett, 48 Iowa 194; Banta *v.* Wood, 32 Iowa 469; Doolittle *v.* Shelton, 1 Greene (Iowa) 272; Stanley *v.* Stanley, 35 S. C. 584, 594, 14 S. E. Rep. 675.

2. King *v.* Vance, 46 Ind. 246; Downer *v.* Shaw, 2 Foster (22 N. H.) 277; Phelps *v.* Baker, 60 Barb. (N. Y.) 107.

A late case in Alabama holds that the judgment in such a case need not be one of condemnation only, but that a personal judgment by default can be rendered against a non-resident in attachment on statutory notice. This, however, is contrary to the prevailing doctrine and is only here cited as an exception to the general rule. Meyer *v.* Keith, 13 So. Rep. 500, 99 Ala. 519. Also First Nat. Bank *v.* Ragan, (Ga.) 18 S. E. Rep. 295; *post*, § 450.

3. Bliss *v.* Heasty, 61 Ill. 338.

4. Green *v.* Hill, 4 Tex. 465; Lester *v.* Watkins, 41 Miss. 647; Philips *v.* Hines, 33 Miss. 163; Miller *v.* Ewing, 8 Sm. & M. (Miss.) 421; Bates *v.* Crow, 57 Miss. 676, 678; Lincoln *v.* Tower, 2 McLean (U. S. C.) 473.

law that a state may assert jurisdiction over the property situate within its territorial limits, and that therefore it may by attachment appropriate such property to the satisfaction of the demands by creditors made in its courts;[1] but it is an equally well settled rule of law that unless the defendant be personally in court, either by personal appearance or because personal service of a writ upon him, no judgment can be rendered against him which will have any binding force beyond the jurisdiction of the court other than against the property within its limits. It follows then that a judgment in attachment entered in a case in which the defendant is not served with process and has not made voluntary defense, has no validity in another state; that while a judgment founded upon personal service of process becomes an absolute debt of record and as such may be recoverable in any state of the Union by proving the judgment, yet a suit can not be brought in another state on a judgment rendered without personal service or appearance. It does not furnish even *prima facie* evidence of an indebtedness in another state. And a want of jurisdiction may also be set up against an action upon such judgment when sought to be enforced in another state.[2]

§ 7. (f) **It is strictly a proceeding at law.**—The remedy by attachment is, except in a very few states, wholly other than an equitable proceeding. It is a special remedy at law, belonging exclusively to court of law, and pursued in conformity with the terms of law. Attachment for the collection of debts is essentially legal, and not equitable, in its nature and procedure, and

1. See last preceding section.

2. D'Arcy *v.* Ketchum, 11 How. (U. S.) 165; St. Clair *v.* Cox, 106 U. S. 350; Thompson *v.* Emmert, 4 McLean (U. S.) 96; Harris *v.* Hardeman, 14 How. (U. S.) 334, 340; Dickinson *v.* Hayes, 31 Conn. 417; Fitzimmons *v.* Marks, 66 Barb. (N. Y.) 333; Pawling *v.* Bird, 13 Johns. (N. Y.) 192; Robinson *v.* Ward, 8 Johns. (N. Y.) 86; Kilburn *v.* Woodworth, 5 Johns. (N. Y.) 37; Force *v.* Gower, 23 How. Pr. (N. Y.) 294; Phelps *v.* Holker, 1 Dall (Pa.) 261; Steel *v.* Smith, 7 Watts & S. (Pa.) 447; Moore *v.* Gennett, 2 Tenn. Ch'y 375; Earthman *v.* Jones, 2 Yerger (Tenn.) 484; Hodges *v.* Bauchman, 8 Yerger (Tenn.) 186; Melhop *v.* Doane, 31 Iowa 397; Manchester *v.* McKee, 9 Ill. (4 Gilm.) 511; Conwell *v.* Thompson, 50 Ill. 329.

necessitates a trial at law upon legal issues.[1] And if, for any cause, the remedy it affords be not full and complete, a court of equity can not cure the deficiency.[2] Nor can a court of equity extend it to cases for which the statute has not provided.[3]

§ 8. (g) **It is wholly statutory, in derogation of the common law, and its rules will be strictly construed.**—The power to take property by attachment, before any debt or claim has been established, is an extraordinary power given by statute against common right.[4] And a court which exercises such extraordinary jurisdiction is only justified in acting under the special powers limited by the statute, and according to the forms of procedure it prescribes. It has no such jurisdiction under its general powers. It is only warranted in making an attachment by virtue of the special and summary statute. Such a statute is extraordinary and exclusive, and to obtain jurisdiction thereunder its direct course must be followed in form and mode prescribed.[5] And the power of the court to act must appear on the face of the proceedings or be proved at the trial.[6]

When compared with processes against property as known to the common law, the statutory writ of attachment has no parallel whatever.[7] It is in derogation of the common law, and the rules laid down by the statute will be strictly construed as to the subjects as well as the means of attachments.[8] Pre-

1. Bachman *v.* Lewis, 27 Mo. App. 81; Lackland *v.* Garesche, 56 Mo. 267; Gage *v.* Gates, 62 Mo. 412, Phillips *v.* Ash, 63 Ala. 414; Henderson *v.* Alabama G. L. I. Co., 72 Ala. 32; DeCelis *v.* Porter, 59 Cal. 464.

2. McPherson *v.* Snowden, 19 Md. 197; Neate *v.* Duke of Marlborough, 3 M. & C. (Eng. Ch'y) 407.

3. Janney *v.* Buell, 55 Ala. 408.

4. Sanford *v.* Pond, 37 Conn. 588.

5. Buckley *v.* Lowry, 2 Mich. 418; Greenvault *v.* Farmers' and M. Bk., 2 Doug. (Mich.) 498, 508; Adler *v.* Cole, 12 Wis. 188; Tiffany *v.* Glover, 3 Greene (Iowa) 387; Godding *v.* Pierce, 13 R. I. 532; McPherson *v.* Snowden, 19 Md. 197; Jaffray *v.* Jennings, 101 Mich. 515, 60 N. W. Rep. 52.

6. Risewick *v.* Davis, 19 Md. 82.

7. Compared with imprisonment for debt see *supra*, § 2.

8. Rowley *v.* Berrian, 12 Ill. 198–202; Barksdale *v.* Hendree, 2 Patt. & H. (Va.) 43; Moore *v.* Hamilton, 7 Ill. (2 Gilm.) 429; Groce *v.* Rittenberry, 14 Ga. 232; James *v.* Jenkins, Hempst. 189; May *v.* Baker, 15 Ill. 89; Pool *v.* Webster, 3 Metc. (Ky.) 278; Wilkie *v.* Jones, 1 Morr. (Iowa) 97; Musgrave *v.* Brady, 1 Morr. (Iowa) 456; Leak *v.* Moorman, Phill. (N. C.) L. 168; Humphrey *v.* Wood, Wright

sumptions will not be sustained and the remedy will not be extended by implication.[1] The proceeding is considered as a violent and extraordinary special remedy, and the plaintiff has uniformly been held to a strict compliance with all the conditions precedent to a judgment by default.[2] Where such conditions are not complied with the attachment will be void for want of jurisdiction, and the judgment creditor taking property thereunder will be held liable to an action of damages for a wrongful taking and conversion of such property.[3]

Contra. The rule above stated, which is a rule of general application not only for the interpretation of attachment statutes, but also of all statutes of every name and nature, is, however, not quite universal. For, although in most states an attachment law, being a creature of the statute, is looked upon with jealousy by the courts, and its provisions therefore guarded and restricted to the precise letter of the statute, a few states seem inclined to broaden the remedy and construe the attachment statutes liberally, with a view to carry into effect the obvious intent of the legislature for the advancement of justice, the suppression of fraud and the benefit of creditors. They hold that a substantial compliance with the provisions of the statute is sufficient, and where initiatory proceedings have not

(Ohio) 566; Wooster *v.* McGee, 1 Tex. 17; Caldwell *v.* Haley, 3 Tex. 317; Rankin *v.* Dulaney, 43 Miss. 197; Wolley *v.* Bowie, 41 Miss. 553; Foster *v.* Simmons, 40 Miss. 585; Robertson *v.* Johnson, 40 Miss. 500; Gates *v.* Flint, 39 Miss. 365; Roy *v.* Heard, 38 Miss. 544; Jefferies *v.* Harvie, 38 Miss. 97; Campbell *v.* Hall, McCahon (Kan.) 53; Parker *v.* Scott, 64 N. C. 118; Caldwell *v.* Sibley, 3 Minn. 406; Frellson *v.* Stewart, 14 La. Ann. 832; Price *v.* Merritt, 13 La. Ann. 526; New Orleans *v.* Garland, 11 La. Ann. 438; Gordon *v.* Baillio, 13 La. Ann. 473; Stockton *v.* Downey, 6 La. Ann. 581; Shirley *v.* Owners, 5 La. Ann. 260; Wilson *v.* Churchman, 4 La. Ann. 452; Planters' Bank *v.* Byrne, 3 La. Ann. 687; Graham *v.* Burckhalter, 2 La. Ann. 415; Boardman *v.* Glenn, 7 La. Ann. 581.

1. Focke *v.* Hardeman, 67 Tex. 173; Bussey *v.* Rothschilds, 26 La. Ann. 258; Denegre *v.* Milne, 10 La. Ann. 324; Barriere *v.* Feste, 9 La. Ann. 535; Beck *v.* Brady, 6 La. Ann. 444; Shropshire *v.* Russell, 2 La. Ann. 961.

2. Van Norman *v.* Judge Jackson Circuit, 45 Mich. 204; Woolkins *v.* Haid, 49 Mich. 299; Millar *v.* Babcock, 29 Mich. 526; Wells *v.* Walsh, 25 Mich. 344; King *v.* Harrington, 14 Mich. 532; Thompson *v.* Thomas, 11 Mich. 274; Wilkie *v.* Jones, 1 Morr. (Iowa.) 97.

3. Kelly *v.* Archer, 48 Barb. (N.Y.) 68.

been wholly regular they are inclined to indulge all presumptions necessary to give jurisdiction and authority to the court.[1]

§ 9. (h) **It is an evolving remedy.**—There seems to be a general inclination of the many state legislatures to broaden the remedy by attachment for the collection of debts and enforcement of demands. This is evidenced by the acts of many of them in late years for permitting an attachment process to issue for the collection of debts not due; for the enforcement of demands arising from other sources than strict contracts; and for the garnishment of things in action and evidences of debt.

§ 10. **Purpose of attachment—to create a provisional lien.**—Attachment is a factor of that system of law which charges the property of a debtor with the payment of his debts. Its purpose is to give to the creditor, from the very commencement of his suit, a lien on the estate of his debtor. It is an anterior process, the purpose of which is to make the jurisdiction of the court in ulterior proceedings more effectual, and to afford the plaintiff security for the satisfaction of the judgment which he may obtain. It is an effort to create a lien upon the debtor's property. The attachment levy from its date operates as such a lien. That is to say, it charges the property levied upon with the payment of the judgment to be rendered, in priority of any subsequent alienations the defendant may make, or of any subsequent encumbrances he may create. The so-called lien created by attachment is, however, an imperfect one. It is not a lien in the sense used in the common law, for it is conditional and qualified. The plaintiff by attachment can only acquire a lien upon the subject of it provisionally; that is to satisfy the particular debt to the amount of the judgment which may be recovered, and only when the debt becomes merged into a judgment. This lien can operate only on the particular property which is the subject of the levy. The lien created by

1. Bank of Augusta *v.* Conrey, 28 Miss. 667; Bryan *v.* Lashley, 21 Miss. 284; Flake *v.* Day, 22 Ala. 132; Runyan *v.* Morgan, 7 Humph. (Tenn.) 210; Irvin *v.* Howard, 37 Ga. 18; Wilson *v.* Spring, 38 Ark. 181.

the attachment is therefore imperfect, incipient, inchoate and conditional. It is a contingent charge only until it is perfected by judgment and levy. It is such a lien as to be notice to third parties of its existence while the suit is pending, but if the plaintiff fails in his suit to establish a legal demand against the defendant, the lien is dissolved; because it is dependent upon the condition that the plaintiff in the suit obtain judgment and execution, into which the attachment lien must be merged to be of any avail.[1]

The lien (for the sole creation of which an attachment proceeding is begun), although qualified, conditional and imperfect, is not without great force and tenacity. It is a rule, universal in its application, that when a court once acquires jurisdiction of a subject-matter, any subsequent error or irregularity will not divest it. In attachment causes the jurisdiction over any given subject-matter is obtained by the levy thereon of a writ properly issued; and no matter what, nor how great errors or irregularities may subsequently occur, the *res* remains in the grasp of the court, and its judgment in regard thereto will be valid and binding until reversed on error or by appeal, or set aside in a direct and appropriate proceeding for that purpose. The judgment can not be vacated collaterally, nor can it be attacked at the suit of a stranger.[2]

§ 11. The purpose and result of the many state statutes are uniform.—From the above brief statement of the whole scope of the attachment law, it will be readily seen that the remedy by attachment is one of great practical importance, extending over a wider field and contemplating a greater diversity of legal

1. Saunders *v.* Columbus Life Ins. Co., 43 Miss. 583; Phillips *v.* Ash, 63 Ala. 414; Hale *v.* Cummings, 3 Ala. 398; Randolph *v.* Carlton, 8 Ala. 606; Downer *v.* Bracket, 21 Vt. 599; Frellson *v.* Green, 19 Ark. 376; *Ex parte* Foster, 2 Story (U. S. C.) 131; Bellows & Peck's Case, 3 Story (U. S. C.) 428; Lamb *v.* Belden, 16 Ark. 539; Tappan *v.* Harrison, 2 Humph. (Tenn.) 172; Stockley *v.* Wadman, 1 Houst. (Del.) 350; Bethune *v.* Gibson, 2 Brev. (S. C.) 501; Crocker *v.* Radcliffe, 3 Brev. (S. C.) 23; Shacklett & Glyde's Appeal, 14 Pa. St. 326; People *v.* Cameron, 7 Ill. 468; Houston *v.* McCluney, 8 W.Va. 135; Peck *v.* Webber, 7 How. (Miss.) 658; Van. Loan *v.* Kline, 10 Johns. (N. Y.) 129.

2. Hardin *v.* Lee, 51 Mo. 241.

doctrines than would be imagined by one who has only casually examined the subject. Because of the very nature of our institutions—there being nearly half a hundred independent sovereignties—the general system of statute law is only uniform to a limited extent. But there is unquestionably a uniform purpose and result. Therefore the rules and principles of the diverse statutory proceedings, designed to have an identical effect, have great general value when judicially established, even though the statutes themselves differ widely in detail. In fact it has been said by one who has perhaps done more to unify the attachment laws of the United Sates than any other one man,[1] that there is probably no other subject of equal extent, in the administration of the law, depending so entirely upon statutory provisions, and so exclusively regulated by them, that would exhibit less diversity of judicial decision than is connected with the subject of attachment.

It is the judicial decisions upon the general rules and precepts of attachment which the following pages of this work purport to consider and classify, for they alone have any extra-territorial effect. Therefore the quotation of statutes will be generally avoided, and the substance of them given only where an omission so to do would lead to uncertainty in the application of the principle enunciated by the court.

Having given above a very brief synopsis of the great and multiform system of American attachment law, we will proceed to a detailed practical consideration of the rules for obtaining aid by means of an attachment.

1. Charles D. Drake, LL. D.

CHAPTER II.

WHAT DEMAND WILL SUPPORT THE ACTION.

§ 12. A demand for money. (a) General view of the subject.
13. (b) Limitation of this treatise.
14. (c) What the term "debt" comprehends.
15. (d) What is a money demand.
16. (e) What is a demand on contract within the attachment law.
17. (f) On contract made outside of the state.
18. (g) On contract to marry.
§ 19. (h) On demand for damages unliquidated.
20. (i) For debts not due.
21. (j) On equitable demands.
22. (k) On demands that have been sued upon.
23. (l) On judgments and decrees.
24. (m) Not on a demand where other security exists.
25. (n) On landlords' or agricultural liens, and laborers' liens.
26. (o) Not on a penalty.
27. (p) On demand *ex delicto*.

§ 12. A demand for money—(a) General view of the subject.—Attachment under the London custom, upon which the American attachment law was built,[1] could only issue in an action of debt, and the debt must have been of such a nature as to support an action at law.[2] In America the remedy has been given a wider application. A few states have permitted it for the recovery of damages arising from torts, and a few have allowed it in actions brought in courts of equity as well as in courts of law, as will hereinafter be more particularly shown. The statutes of all the states confine it to actions for the recovery of money.[3] They variously state it to be competent "for the recovery of money;"[4] in a "civil action" "for the recovery of money;"[5] "on contract express or implied for the direct payment of money;"[6] "upon money demands whether *ex con-*

1. See *ante*, § 1.
2. Privilegia Londini, 245; Ashley on Attachment, 21, 22.
3. It can not be used as a means for recovering specific property. Gates *v.* Bennett, 33 Ark. 475.
4. Minnesota Statutes, title 15, § 4982.
5. Arkansas Statutes, Chap. IX, § 309.
6. California Code, § 537.

tractu or *ex delicto*,"[1] and for the recovery of money when the defendant has either "fraudulently or *criminally* contracted the debt or incurred the obligation,"[2] and for "any injury to personal property in consequence of negligence, fraud, or other wrongful act,"[3] and many other provisions within these limits. Each statutory provision being strictly construed, and solely applicable within the state where it was enacted, the repetition of it in a general work of this character would, if not irrelevant, be at least cumbersome, and undesirable to all except the local practitioner, who must of necessity familiarize himself with the provisions of the controlling statute in each particular instance. It may, however, be stated as a universal rule, that an attachment can only be sued out for the recovery of money on a present existing, certain demand. A demand that has existed in the past merely, or one which is acquired after the issuing of the writ will not support the action.[4] Attachment is not a writ that can be invoked to remedy prosecutive, conditional, or contingent liability.[5] The demand must always exist, though it need not in all states be due.

§ 13. **(b) Limitation of this treatise.**—In a work of such general character as this is designed to be, there seems to be little need of referring to the various state statutes and codes defining the exact character of claim against a debtor

1. Georgia Code, § 3278 (3210, 3199).

2. Ohio Code, § 5521, subsec. 9; Sturdevant *v.* Tuttle, 22 Ohio State 111; Creasser *v.* Young, 31 Ohio State, 57.

3. N. C. Code, § 347, subsec. 3; Newbern Gaslight Co. *v.* Lewis Mercer Cons. Co., 113 N. C. 549; 18 S. E. Rep. 693.

4. In Iowa, when such demand exists on behalf of the state, there must be a demand of payment, or for security, made before attachment will lie. State *v.* Morris, 50 Iowa 203.

5. Black *v.* Zacharie, 3 How. 485; Mechanics', etc., Bank *v.* Dakin, 33 How. (N. Y.) Pr. 316; Westcott *v.* Sharp, 50 N. J. 392, 13 Atl. Rep. 243; Humphreys *v.* Matthews, 11 Ill. 471; Henderson *v.* Thornton, 37 Miss. 448; Denegre *v.* Milne, 10 La. Ann. 324; Barriere *v.* Feste, 9 La. Ann. 535; Blanchard *v.* Grousset, 1 La. Ann. 96.

An article of agreement was entered into between A of the first part, and B and his wife of the second part, but the covenants of A ran to B alone, because of which it was held that the wife of B could not properly be joined as plaintiff with her husband in an attachment suit against A, founded upon an alleged breach of his covenants. Hugh *v.* Kugler, 36 Md. 186.

which may be enforced by attachment, because it is presumed that the local practitioner will have informed himself in that regard by consulting the special statute governing his case. It is believed he will not consult a text-book to ascertain on what particular class of claims he may bring attachment, but that, knowing the statutory provision regarding the demands which may be enforced by attachment, he will then want to know what the courts have decided to be demands of that class. In other words, that, having the rule, he will want to know its interpretation and application. Therefore, the following sections are not designed to point out which states will permit attachments for demands of the classes named, but to indicate the reasoning of courts when attachments are permitted to aid in the collection of such claims.

§ 14. (c) **What the term "debt" comprehends.**—Blackstone says a debt is "a sum of money due by certain and express agreement." It has been given a somewhat broader significance in this country, wherein it has been held "a debt is a sum of money due by contract, express or implied."[1] And with regard to attachment it is such debt as can be enforced in an action of debt or *indebitatus assumpsit*.[2] In Maryland and Michigan a demand which is founded upon a contract, which of itself ascertains the amount of the indebtedness, or which furnishes a standard enabling the plaintiff to aver it in his affi-

1. Perry *v.* Washburne, 20 Cal. 318; Hunt *v.* Norris, 4 Martin (La.) 517.

2. Mills *v.* Roberts, 14 Ga. 230; Hassie *v.* God, etc., Cong., 35 Cal. 378.

Under such holding the following case arose: A congregation contracted with a builder to erect for it a synagogue, and to pay him therefor in installments upon the architect's certificates as the work progressed. The builder then contracted with a bricklayer to do for him the brick work, and to pay therefor in installments as the bricklayer progressed, assigning and setting apart to the bricklayer a sum to become due on the building contract, equal to the whole sum, to fall due on the bricklaying contract. On delivery by the architect of a certificate to the bricklayer of installments due to the builder for work, an attaching creditor of the bricklayer garnished the congregation. It was held that no such legal demand existed in favor of the bricklayer against the congregation as was liable to garnishment. Hassie *v.* God, etc., Cong., 35 Cal. 378.

davit or the jury to find it, there is such an indebtedness as will be ground for attachment.[1] In Kansas, when damages have resulted from a breach of a contract to deliver cattle, there is such a "debt" as will sustain an action in attachment when properly shown.[2] In Alabama a demand to deliver cotton at a future time is not a "debt," there being no default in the delivery of the cotton, the time therefor having not arrived.[3] In a case where the defendant hired a barge from the plaintiff at a certain rate per day, agreeing that if it was not returned in as good condition as when hired, the defendant should pay a certain agreed value of the barge as upon a sale, and the barge when returned being in a worthless state, it was held that the plaintiff's claim was such a "debt" or a "money demand, the amount of which could be easily ascertained," within the meaning of the statute, as would support an attachment.[4] In Virginia a claim arising on a contract of bailment made outside of the state against a non-resident, is a claim for debt on which attachment will lie.[5] A claim arising out of the official neglect of the clerk of a court is not a "debt" which will support a foreign attachment. And a clerk of a court, if a non-resident, is not amenable to the jurisdiction of the court as an absent defendant. He is not answerable as a "debtor" but as a tort-feasor.[6]

A claim of the holder against the endorser of a promissory note not due is a "debt" within the meaning of the Ohio code authorizing attachments in certain cases before the debt becomes due.[7] In Colorado where the code provides for the

1. Wilson *v.* Wilson, 8 Gill (Md.) 192; Roelofson *v.* Hatch, 3 Mich. 277.

And if such indebtedness can be affirmed, "as near as may be," it will be sufficient.

2. Stiff *v.* Fisher, 2 Tex. Civ. App. 346, 21 S. W. Rep. 291; Stiff *v.* Fisher, 2 Tex. Civ. App. 295, 21 S. W. Rep. 291.

3. Moore *v.* Dickerson, 44 Ala. 485.

4. Tennessee River Transp. Co. *v.* Kavanaugh, 93 Ala. 324, 9 So. Rep. 395.

5. Peter *v.* Butler, 1 Leigh (Va.) 285.

6. Dunlop *v.* Keith, 1 Leigh (Va.) 430.

7. Smead *v.* Chrisfield, 1 Handy (Ohio) 442.

And where a firm was dissolved and the partner, who was to continue the business, took the assets, assumed all the indebtedness of the firm, gave his notes to the retiring partner to secure him against the firm creditor, all payments of debts which the continuing

bringing of an action in attachment on a written instrument for the payment of money, a certified check with payment refused is such debt as will constitute a good cause of attachment.[1] But an appeal bond conditioned that if defendant will duly prosecute his appeal, and pay the judgment in case the same shall be affirmed, then the obligation shall be void, otherwise it shall remain in full force, is not a written instrument for the direct payment of money within the meaning of the Colorado code, which provides that "in all actions brought upon overdue promissory notes, bills of exchange, other written instruments for the payment of money, and upon book accounts," the creditors may have a writ of attachment issued.[2] Nor is a suit on an administrator's bond a suit on a "written instrument for the direct payment of money," under the Colorado code.[3]

The provisions permitting an attachment to issue in case of the existence of a debt, necessarily contemplated a debt that is not illegal, hence where coverture still constitutes a bar to the making of a legal contract, the property of a married woman can not be subject thereto, and, if the property of a married woman has been subject to a sale under attachment, the sale may be attacked collaterally.[4]

There is no uniformity in the provisions of the statutes, nor in the decisions of the courts when such statutes are silent thereon, as to whether the "debt" must be strictly a legal debt enforcible in an action at law or whether it also includes an equitable indebtedness recoverable only in a suit in chancery. It has been said that although an attachment might have been

partner should make to be credited on the notes and the notes be unconditional on their face, it was held that the notes were evidence of such an indebtedness as would support a writ of attachment. Brown *v.* Wyatt, 72 Tex. 60.

A claim for general average is a debt "contracted and owing," which will support a foreign attachment when sued out to recover the same. Morris *v.* Turner, 3 Pa. Law Jour. Rep. 423.

1. Breene *v.* Merchants' etc., Bank (Colo.), 17 Pac. Rep. 280.

2. Hurd *v.* McClellan, 14 Colo. 213; 23 Pac. Rep. 792.

3. People *v.* Boylan, 25 Fed. Rep. 594.

4. Williams *v.* St. Louis, Iron Mountain, etc., Ry. Co., 8 Mo. App. 135.

had at law, yet if equity has acquired jurisdiction of the subject-matter an equitable attachment may issue.[1] Then again it has been further held, under special statutory provisions, that the remedy in equity is co-extensive with that at law and that an equitable attachment is proper for a debt on property held by an equitable title.[2] But it has also been held that attachment will not lie in aid of a bill in equity to charge the separate estate of a married woman.[3] It has been refused in an action for injunction against the infringement of a trade-mark and for damages;[4] and where the demand is merely of an equitable nature.[5]

Under many statutes the establishment of an existing "debt" is not a sufficient showing of a claim entitling the plaintiff to an attachment. The further fact must be established that the indebtedness has matured—that the debt is due. Where such is the requirement, the issuance of the writ before the debt is due will render the plaintiff liable for damages, notwithstanding the fact that he may have filed an amended affidavit or petition on the maturing of the indebtedness.[6] Under a provision that the debt must be "due absolutely, and without depending upon any contingency," the contingency contemplated is not a mere uncertainty how the balance may stand between the creditor and the alleged debtor; but is such a contingency as may preclude the creditor from any right to collect the alleged debtor's account.[7]

§ 15. (d) **What is a "money demand."**—Where the provision of the statute is that an attachment may issue "in an action for the recovery of money," it can not be sustained in

1. Epping *v.* Aiken, 71 Ga. 600.

2. Ware *v.* Seasongood, 92 Ala. 152; 9 So. Rep. 138.

3. Brumback *v.* Weinstein, 37 Mo. App. 520.

4. Guilhon *v.* Lindo, 9 Bosw. (N. Y.) 601.

5. Graham *v.* Merrill, 5 Coldw. (Tenn.) 622. See further as to "Equitable Demands," *post*, § 21.

6. Young *v.* Broadbent, 23 Ia. 539; Graham *v.* Merrill, 5 Coldw. (Tenn.) 622.

A creditor having taken a negotiable note in a settlement of accounts with the debtor, no right of action accrues till after the dishonor of the note. McCluny *v.* Jackson, 6 Gratt. (Va.) 96.

7. Dwinel *v.* Stone, 30 Me. 384.

an action for damages, as by an injunction against the infringement of a trade-mark, for it was not intended that it should be applied as a provisional remedy in an action of an equitable nature, where the amount which the plaintiff may recover must be ascertained by an accounting.[1] And where it is provided that an attachment may issue on a money demand, it can not be employed to enforce the fulfillment of a promise to pay in solvent notes, because such claim is not a money demand until after the failure to pay the notes.[2] Neither is a suit to foreclose a mortgage an action for the recovery of "money alone."[3] But again, on the other hand, it has been held that an attachment may properly issue in an action to foreclose a mechanic's lien for the amount of money claimed on an account under a statute allowing an attachment in every "civil action for the recovery of money," because the debt is the real subject of the action and the lien merely subservient thereto.[4]

Actions arising upon default made in the payment of bail bonds, official bonds, appeal bonds and other undertakings have been, with few exceptions, pronounced to be *not* actions upon a "money demand," but actions arising on penalties; and hence, actions sounding in tort and not on contract.[5]

§ 16. (e) **What is a demand "on contract," within the attachment law.**—Courts construe the statutes providing that an attachment may issue in actions "on contracts" to include only contracts actually made between the parties, or at most only those implied from their dealings. They do not extend such provision to include that class of obligations depending on contract by matter of record.[6] It is observable, however,

1. Guilhon *v.* Lindo, 9 Bosw. (N. Y.) 601.

2. Monroe *v.* Bishop, 29 Ga. 159.

3. Van Wyck *v.* Bauer, 9 Abb. Pr. (N. Y.) N. S. 142.

4. Gillespie *v.* Lovell, 7 Kans. 419. An action for breach of warranty of title to personal property is a "money demand, the amount of which can be ascertained." Guy *v.* Lee, 81 Ala. 163, 2 So. Rep. 273.

5. See *post*, § 26.

6. Gutta-Percha, etc., Co. *v.* City of Houston, 46 Hun (N. Y.) 237; Griswold *v.* Sharpe, 2 Cal. 17; Barker *v.* Esty, 19 Vt. 131; Minga *v.* Zollicoffer, 1 Ired. (N. C.) 278.

that although many declarations are made to the contrary, many courts seem inclined to extend the remedy by attachment. They will sustain it in cases sounding in contract where the plaintiff swears to the amount claimed, or the amount in controversy can be defined with sufficient accuracy to enable the court to fix the bail to be given by the defendant in order to dissolve the attachment.[1] They hold that it is not necessary that the amount due on the contract shall appear from the contract itself, but that the amount of the indebtedness may be shown by the affidavit.[2] Where the provision is that the attachment can only issue on demands arising on contracts, they are inclined to apply it to cases on demands unliquidated.[3] They claim to "construe the statutes liberally with a view to carry into effect the obvious intent of the legislature," in permitting the recovery of damages for the breach of a contract;[4] especially in cases where a defendant has no property in the state subject to execution, or not enough to satisfy the plaintiff's demand, and where the collection will be endangered by the delay in obtaining judgment.[5] But they will not construe it to include contracts enforcible properly only in courts of equity. An action between partners for an accounting is not an action upon a "demand arising upon a contract," within the meaning of the Kansas code, so as to enable the plaintiff to attach the property of a non-resident.[6]

In the judicial interpretation of the meaning of the word "contract" in the attachment law, opinions are as diverse as

1. Strock *v.* Little, 45 Pa. St. 416.

2. Dunn *v.* Mackey, 80 Cal. 104.

3. Lenox *v.* Howland, 3 Caines (N. Y.) 323. See, also, *post*, § 19.

If an action be brought for the recovery of damages for the breach of an express contract, the charging of fraudulent representations will not convert the action into one of tort, and an attachment will be nevertheless sustained. Whitney *v.* Hirsch, 39 Hun (N. Y.) 325.

Where B, in selling cattle to A, made fraudulent representations regarding the value of a certain mortgage to be given in part payment, A's action against B for the price of the cattle is an action on an express contract within the meaning of the attachment law permitting attachments where the debt was fraudulently contracted. Littlejohn *v.* Jacobs, 66 Wis. 600; and see further as to "fraud in contracting the debt," *post*, § 125.

4. Runyon *v.* Morgan, 7 Humph. (Tenn.) 210.,

5. Francis *v.* Burnett, 84 Ky. 23.

6. Treadway *v.* Ryan, 3 Kan. 437.

in other matters of attachment. An action on an attachment bond is within the meaning of the Nebraska code, providing that an attachment for any claim other than a "debt," or "demand arising upon contract," and may be maintained by attachment against the property of a non-resident, although the damages are unliquidated.[1] A breach of covenant of warranty is a debt arising under a contract which may be recovered by attachment.[2] And where one is under contract to purchase corn for another, who thereafter complains that the corn was not sound, but heated, sour and unmerchantable, his claim for damages will be a claim arising on a contract;[3] so will an action against a railway company to recover upon coupons and scrip certificates representing interest payable semi-annually out of the company's net or surplus income;[4] and so will the personal liability of a stockholder for his proportion of the corporate debts,[5] and for subscriptions to the capital stock.[6] But in an action for the recovery of damages for the loss, by negligence of a common carrier, of goods entrusted to him for transportation, is not "an action arising on contract."[7] Nor is an action to recover back money deposited under an executory contract, upon the ground of fraud in inducing plaintiff to make deposit, without any allegation of demand and refusal, under the New York code. The gravamen of the action is the fraud.[8] An action to enforce a liability conferred by a statute—in this case the recovery of costs—is not an action on a contract express or implied.[9]

A statute which provides that "the remedy by attachment shall apply to all actions on demands, founded by any indebt-

1. Withers *v.* Brittian, 35 Neb. 436.

2. Cheney *v.* Straube, 35 Neb. 521; Jeffry *v.* Wooley, 10 N. J. L. (5 Hals.) 123.

3. Lawton *v.* Kiel, 51 Barb. (N. Y.) 30.

4. Seeley *v.* Missouri, K. & T. Ry. Co., 39 Fed. Rep. 252.

5. Kennedy *v.* California Sav. Bank, 97 Cal. 93, 31 Pac. Rep. 846.

6. Kohler *v.* Agassiz, 99 Cal. 9, 33 Pac. Rep. 741; Flag *v.* Dare, (Cal.) 40 Pac. Rep. 804.

7. Atlantic, etc., Ins. Co. *v.* McLoon, 48 Barb. (N. Y.) 27.

8. Knapp *v.* Meigs, 11 Abb. (N. Y.) Pr. N. S. 405.

9. Remington Paper Co. *v.* O'Dougherty, 32 Hun (N. Y.) 255.

An attachment or warrant for sheriff's fees, quashed. Arrants *v.* Dumagin, 1 Har. & M. (Md.) 218.

edness, or for the recovery of damages for the breach of any contract, express or implied," etc., is construed to mean that, whenever *assumpsit* will lie for breach of an implied contract, attachment is maintainable to recover damages therefor, though the breach be tortious. Hence an attachment was sustained on an account containing an item of damages for injury to a horse, by overdriving, while in possession of a bailee for hire.[1]

A parol contract for the sale of land being excepted from the statute of frauds in Alabama provided the "purchase-money, or a part thereof, is paid and the purchaser put in possession of the land," an attachment will issue for the balance of the purchase-money of land, though the purchaser never executed any written agreement to the purchase.[2]

The law implies a promise to refund the money paid, when the consideration for which it was paid entirely fails, hence, in such a case, attachment will be allowed to issue as on a contract.[3]

When the whole transaction shows a mutual account, consisting of debits and credits, an attachment can not be maintained upon the ground that the action is on an express contract for the payment of money, and that the indebtedness accrued for work and labor done and services rendered that should have been paid for upon completion.[4]

1. Nethery *v.* Belden, 66 Miss. 490, 6 So. Rep. 464.

Embezzlement by a clerk is a breach of a contract of employment. *Assumpsit* is the proper form of action and attachment may issue. Farmers' Nat. Bank *v.* Fonda, 65 Mich. 533; 32 N. W. Rep. 664.

2. Steadham *v.* Parrish, 93 Ala. 465, 9 So. Rep. 358.

An affidavit for an attachment stated that the defendant was a nonresident of the state; that he had sold certain lands to the plaintiff and agreed to complete the building thereon, but that he had failed to deliver possession until a much later date. By reason of such delay the plaintiff was unable to rent the places for as much per month by $130 as he would have been able to do had possession been delivered at the time agreed; that the damages sustained between the time the property should have been delivered and the time it was delivered was $494, making the total damages $968. Such affidavit sustained an attachment under a statute permitting a writ to issue in an "action arising on a contract for the recovery of money only." Fuller, J., dissenting. Coats *v.* Arthus (S. D.), 58 N. W. Rep. 675.

3. Santa Clara Valley, etc., Co. *v.* Tuck, 53 Cal. 304.

4. Morris *v.* Everly (Col. Sup.), 36 Pac. Rep. 150.

Where the contract in regard to payment has been modified or waived by the claimant, an attachment will not be allowed; as, in a case where the debtor failed to pay the price or value of an article or thing delivered, which by contract he was appointed to pay upon delivery and the vendor had waived the right to demand payment upon delivery;[1] or where the goods were delivered without making demand at the time.[2]

On contracts the remedy by attachment is limited, as respects the cause of action, to debts contracted or owing by the defendant; hence, where bank notes are stolen, the thief is not liable to the bank in this process.[3]

The writ of attachment can not issue in an action pending in the circuit court, on appeal by plaintiff from justice's judgment in his favor for a sum less than claimed by him, since such action, on appeal, is not an action *ex contractu* to recover money.[4]

With an inclination to extend the operation of the process of attachment, it has been said that if the *form* of the action is *ex contractu* attachment will lie though the *cause* may have originally been *ex delicto*. It seems the tort may be waived and that, too, against an infant, and the attachment sustained.[5]

§ 17. **(f) On contracts made outside of the state.**—It seems to be the policy of the attachment laws to restrict the advantages to be gained by an attachment process to domestic creditors. In some states there is also a special statutory provision requiring the contract to have been made in the state or to be there payable. A statute of Oregon permits an attachment upon contracts for the direct payment of money which are made or are payable in the state, and on contracts not made in the state when there is an express stipulation that it should be paid in the state.[6] And under the California code the contract must expressly stipulate that it must be performed within the state

1. Young *v.* Lynch, 30 Kan. 205.
2. St. Louis Type Foundry *v.* Union Printing, etc., Co., 3 Mo. App. 142.
3. Piscataqua Bank *v.* Turnley, 1 Miles (Pa.) 312.
4. Zechman *v.* Haak, 85 Wis. 656, 56 N. W. Rep. 158.
5. Elwell *v.* Martin, 32 Vt. 217: see also *post*, § 27.
6. Trabant *v.* Rummell, 14 Ore. 17.

when it is made elsewhere.[1] But in Virginia, a claim arising on a contract of bailment made out of the state, against a non-resident, is a claim for debt, for which a foreign attachment in chancery has been sustained.[2] In Pennsylvania it is held that residents in Canada, though citizens of the United States, and creditors of a European firm having property in the United States, are not domestic creditors, and therefore are not entitled to a foreign attachment to subject such property.[3] A citizen of another state can sue out a writ of foreign attachment against a foreign corporation.[4]

§ 18. (g) **On contract to marry.**—The breach of a contract to marry has been held to be a money demand within the statute permitting attachment,[5] but an attachment thereon is not generally favored, because such breach of contract is said to rank among willful and malicious wrongs to the person and character, wherein damages are meted out to the delinquent party on the principle of punishment as well as upon the theory of pecuniary indemnity for the actual loss sustained. Therefore, unless an attachment for demands arising *ex delicto* is also permitted, attachment for a breach of contract of marriage will generally be denied; and if an attachment has issued in such case it will be set aside on motion.[6]

§ 19. (h) **On demand for damages unliquidated.**—The rule in many states is that where the damages demanded by the plaintiff are merely speculative or uncertain, an attachment will not be issued to aid him in securing satisfaction of them,[7]

1. Eck *v.* Hoffman, 55 Cal. 501; Dulton *v.* Shelton, 3 Cal. 206.

2. Peter *v.* Butler, 1 Leigh (Va.) 285.

3. Long *v.* Girdwood (Pa. Com. Pl.), 28 W. N. C. 229.

4. John J Ray Clark *v.* Toby Val. Supply Co., (Pa. Co. Ct. R.) 344. See *ante*, § 17.

5. Morton *v.* Pearman, 28 Ga. 323.

6. Barnes *v.* Buck, 1 Lans. (N. Y.) 268.

The code of civil procedure of New York expressly negatives the right to have attachment on contract of marriage. Code Civil Procedure, 635.

7. Hugg *v.* Booth, 2 Ired. (N. C.) 282; Deaver *v.* Keith, 5 Ired. (N. C.) 374; Zerega *v.* McDonald, 1 Woods 496; Hoover *v.* Hathaway, Soule & Harrington, 20 D. C. 591; White *v.* Goodson T. C. & S. M. Co., 24 Civ. Proc. Rep. 411, 34 N. Y. S. 797.

even though resulting from the breach of an express contract,[1] because the sum due must generally be affirmed with certainty. The loss of profits which might have accrued to the plaintiff, had the defendant performed his contract, is such an uncertain amount as to preclude the right of attachment.[2] However, many other states are so broad in their construction as to allow any *creditor* to have the aid of demands arising on *contract*, whether such demands are in strict debt, or for damages unliquidated.[3]

Under the Maryland code, when the plaintiff seeks the aid of a process of attachment to enforce an unliquidated demand he must give a specific bond that the defendant may be indemnified in the event of his being damaged by such attachment. But in an action for damages for failure to sell a note at less than its face value, it was presumed that the damages was the difference between the face value and the agreed price, and it was held that the claim based on such breach was not one for unliquidated damages, and hence no such bond was required.[4]

§ 20. (i) **For debts not due.**—Even before the enactment of specific statutes enabling a creditor for certain causes to sue out an attachment on his demand before it had become due and payable, the courts were inclined to depart from the old rule and permit an attachment in such cases. It was long ago said that the process being legal, having issued on proper grounds, and a proper showing, the immaturity of the demand was not to be allowed to defeat a recovery.[5] And it was also allowed when the claim was only equitably due.[6] But the ex-

1. Carland *v.* Cunningham, 37 Pa. St. 228. Compare Pollard *v.* Dwight, 4 Cranch. (U. S.) 421.

2. Wilson *v.* Louis Cook Mfg. Co., 88 N. C. 5.

3. Lenox *v.* Howland, 3 Caines (N. Y.) 323; New Haven, etc., Co. *v.* Fowler, 28 Conn. 103; Baumgardner *v.* Domagiac Mfg. Co., 50 Minn. 381, 52 N. W. Rep. 964; Withers *v.* Brittain, 35 Neb. 436, 53 N. W. Rep. 375; Cota *v.* Mishow, 62 Me. 124.

4. Dirickson *v.* Showell, (Md.) 28 Atl. Rep. 896.

5. McCullough *v.* Grishobber, 4 Watts & S. (Pa.) 201; Danforth *v.* Carter, 1 Iowa 546; Brace *v.* Grady, 36 Iowa 352; Bacon *v.* Marshall, 37 Iowa 581.

6. Patrick *v.* Montader, 13 Cal. 434.

istence of the debt at the time of the issuance of the writ was, and is, the condition on which the same must stand or fall, although the period of payment may not yet have arrived.[1]

Attachments on demands not due, though allowed to be begun, must not be prosecuted to judgment before maturity of the demand. Such a judgment would be erroneous.[2]

Many special statutes now provide that an attachment writ may issue in certain cases before the demand is due and payable. It is, however, an almost universal condition precedent to the issuance of a writ of attachment for demands not due, when the same is allowed by statutory provision, that the particular circumstances or conditions on which the same is allowable must be first made specifically to appear. Under the South Carolina statute providing that whenever a debt is not yet due, and it appears to the satisfaction of the circuit judge or clerk of the court that the debtor has departed from the state with intent to defraud his creditors, or to avoid service of summons, or has removed or is about to remove some of his property, the plaintiff may issue his warrant of attachment as if the debt were due and payable; the plaintiff failed to bring himself within such provision by an affidavit made at the commencement of the suit brought against the defendant as a foreign corporation, when it was not made to appear therein that the debt was not yet due nor that the defendant was attempting any of the acts mentioned in the statute. The plaintiff was not entitled to an attachment as on a debt not yet due.[3] The Mississippi code, giving the right to attachment for a debt not due, provides that the creditor "may obtain an attachment in the county where the debtor resides or last resided, or where his property may be found." Consequently, when the affidavit is for an attachment on a debt past due, and the declaration

1. Read *v.* Ware, 2 La. Ann. 498; Shannon *v.* Langhorn, 9 La. Ann. 526; Barriere *v.* Feste, 9 La. Ann. 535; Denegre *v.* Milne, 10 La. Ann. 324; Todd *v.* Shouse, 14 La. Ann. 426; Thomas *v.* Wetzler, 4 La. Ann. 184.

2. Rice *v.* Jerenson, 54 Wis. 248; Jones *v.* Holland, 47 Ala. 732; Ware *v.* Todd, 1 Ala. 199.

3. Correll *v.* Georgia Construction and Investment Co. (S. C.), 16 S. E. Rep. 156.

shows that it is not due and it is neither made to appear that the defendant is a resident of the county where the writ was issued; nor that his last place of residence was there; nor that his property was found there, the writ will be quashed and the plaintiff will not be granted leave to amend the affidavit and writ so as to show an attachment to collect a debt not due.[1] Under the laws of Washington, which provide for attachment on debts not due where the debtor has made a fraudulent disposal of his property, the allegation of the fact of such disposal is material and must be proved in order to justify the bringing of an attachment before such debt is due.[2] Where the affidavit on which it is based states none of the grounds for attachment on a debt not due, which are required by the statute, the proceeding will be dismissed.[3] Furthermore, the action must be brought under a law permitting attachments to issue on demands not due, for if it be brought under another law, also then in force, the process will be quashed.[4]

An action of attachment is an exception to the rule that no suit can be maintained on a promissory note, on the day it is due, but it can only be as upon a debt not due.[5] An action upon notes given for rent may be commenced in Iowa before they are due if nothing but time is needed to make the indebtedness absolute, and it be alleged that the debtor is about to dispose of his property with intent to defraud his creditors.[6] The claim of the holder against the indorser of a promissory note, not due, is a "debt" within the meaning of the Ohio code, authorizing attachments in certain cases, before a debt becomes due.[7] In West Virginia an accommodation maker of a negotiable note not due may sue in equity against an absconding

1. Yale *v.* McDaniel, 69 Miss. 337, 12 So. Rep. 556.

2. Cox *v.* Dawson, 2 Wash. 381, 26 Pac. Rep. 973.

3. William Deering & Co. *v.* Warren, 1 S. D. 35, 44 N. W. Rep. 1068.

4. A vendor sold goods for which he accepted notes, and, on the day the first note matured, brought *assumpsit* begun by attachment under the act of 1869. *Held*, that the action was prematurely brought, since attachment under the act of 1869 does not lie for a debt not yet due. Jones *v.* Brown, (Pa. Com. Pl.) 3 Pa. Dist. Rep. 294.

5. Cox *v.* Reinhardt, 41 Tex. 591.

6. Brace *v.* Grady, 36 Ia. 352.

7 Smead *v.* Crisfield, 1 Handy (Ohio) 442; Brannin *v.* Smith, 2 Disney (Ohio) 436.

debtor, although the maker has not paid the note, because he is bound to pay it when it becomes due.[1] But the law of Missouri, which allows attachments to enforce existing debts, although not due, will not permit an attachment by the acceptor of a bill of exchange for the accommodation of the drawer against the drawer before maturity and before the payment by the acceptor; because until such payment is made he has no demand against the drawer on account of the bill.[2] One who endorses a note becomes a debtor of the holder after compliance with the conditions requiring presentment at maturity, upon failure of the maker to pay and upon due notice given, but until then he will not be liable in attachment.[3]

In California, however, an attachment issued upon a debt not due is void as against other creditors whose rights are injured by such attachment. [4]

An attachment is the only proceeding that can be maintained on a debt not due. Therefore it must be borne in mind that although a statute may provide for the bringing of an attachment upon a debt not due, yet if for any reason the attachment is dissolved, the entire proceeding fails; for the sole purpose which authorizes a suit on a demand not due is to allow an attachment to issue for it.[5]

This section is designed to aid practitioners in states where an attachment may issue on a demand before maturity and no reference is herein made to states not permitting it in such cases, but as an interesting example of what is not an action for the recovery of a debt not due we give the following: A vendor who, after contracting to deliver cotton at a future day and receving payment therefor, disabled himself before the delivery day from complying with the contract, was properly proceeded against by attachment before the day fixed for the delivery of the cotton; but had there been no proof of breach of contract other than the failure to deliver on the appointed day the attachment would not have been sustained.[6]

1. Altmeyer *v.* Caulfield, 37 W. Va. 847, 17 S. E. Rep. 409.
2. Ellis *v.* Harrison, 104 Mo. 270; 16 S. W. Rep. 198.
3. H. B. Claflin Co. *v.* Feibleman, 44 La. Ann. 518, 10 So. Rep. 862.
4. Davis *v.* Eppinger, 18 Cal. 378.
5. Gowan *v.* Hanson, 55 Wis. 341.
6. Russell *v.* Gregory, 62 Ala. 454.

§ 21. (j) **On equitable demands.**—Independent of special statutory provisions the general rule is that attachments are not allowed on demands which are equitable in their nature.[1] But while it has been said that attachment can only be had on demands collectible in a suit at law, yet some states have declared that a plaintiff in equity is entitled precisely as in law, to attachment for good cause shown.[2] And when they so hold it will be proper to issue an attachment in any civil action, whether by ordinary proceedings or by proceeding in equity.[3] When allowed, an attachment is the same process in equity as at law.[4] But when an attachment is permitted in a proceeding in equity, it will not lie on a purely legal demand against a non-resident who has property and effects within the state more than sufficient to satisfy the demand which may be reached and subjected by attachment at law.[5]

§ 22. (k) **On demands that have been sued upon.**—Attachment in aid of suits begun, or ancillary proceedings, will receive consideration in a subsequent part of this work,[6] and it is sufficient to remark here, that if the character of the demand be one on which an attachment may properly issue, the right to such attachment will not be affected by the fact that another suit has been begun thereon. Attachment is a provisional remedy and was not formerly an original process.[7] And although it has since become an original process by the statutory provisions of many states, it is nevertheless a provisional remedy still in its nature and may be issued pending another suit at any time before the final determination thereof;[8] even after verdict, if before final judgment is rendered and recorded.[9] After judgment a writ of execution is the proper process.[10]

1. Shiel *v.* Patrick, 8 C. C. A. 440, 59 Fed. Rep. 992; Ebner *v.* Bradford, 3 Abb. (N. Y.) Pr. N. S. 248; Graham *v.* Merrill, 45 Tenn. 622, 5 Cold. 622.

2. Crouch *v.* Crouch, 9 Iowa 269.

3. Curry *v.* Allen, 55 Iowa 318; American Land Co. *v.* Grady, 33 Ark. 550.

4. Terrill *v.* Rogers, 3 Hayw. (Tenn.) 203.

5. McKenzie *v.* Bentley, 30 Ala. 139.

6. See *post*, § 215.

7. Rand *v.* Sherman, 6 N. H. 29.

8. Wood *v.* Carter, 29 Ga. 580.

9. Davis *v.* Jenkins, 46 Kan. 19, 26 Pac. Rep. 459.

10. See next succeeding section.

A plaintiff seems not to be estopped from bringing an action in attachment, by the fact that he has sued out an attachment for the same cause of action in another state, unless, perhaps, in case the defendant has given bail on the first attachment; in which case it was held that this was a case of damages not susceptible of liquidation so as to sustain a foreign attachment.[1] But where a judgment has been obtained for the same demand in a sister state and an execution levied in pursuance thereof, an action of attachment will not be permitted.[2]

§ 23. (1) **On judgments and decrees.**—When the statute permits an attachment on an "indebtedness," it may issue upon a judgment under the same circumstances that will sustain it on other indebtedness, but when the statute provides that an attachment may issue only on demands "arising on contract," it can not be sustained upon a judgment, because the courts incline to construe such statutes to include only contracts actually made between the parties, or to be implied from their dealings, and not to extend it to that class of obligations depending on contracts by matter of record.[3] A judgment, although founded on contract, is not in itself a contract.[4] The judgment supersedes the attachment, and thereafter no action can be taken under it.[5]

The reason of the rule is that the judgment may be enforced by a writ of execution, and it is useless thereafter to resort to a writ of attachment. It has been pertinently said, that "costs should not be imposed upon the defendant, or other injury inflicted upon him, for no end that could prove useful to the plaintiff. There is something barbarous in it and wholly inconsistent with the mild, benignant, and just spirit of the common

1. Clark *v.* Wilson, 3 Wash. (U. S. C. C.) 560.

2. Downing *v.* Phillips, 4 Yeats (Pa.) 274.

3. Gutta Percha, etc., Co. *v.* Mayor, etc., 46 Hun (N. Y.) 237, 108 N. Y. 276.

4. McCoun *v.* N. Y. Cent. R. R. Co., 50 N. Y. 176; O'Brien *v.* Young, 25 N. Y. 428. *Contra*, First Nat. Bank *v.* Van Vooris, (S. Dak.) 62 N. W. Rep. 378.

5. Shieb *v.* Baldwin, 22 How. (N. Y.) Pr. 278; Lynch *v.* Crary, 52 N. Y. 181.

But it has been held in Illinois that where a creditor has a judgment upon which he has a right to issue an execution, he may sue by attachment upon that judgment in the same court in which it was rendered. Young *v.* Cooper, 59 Ill. 121.

law. As long as the judgment is operative the creditor has the means of enforcing payment, and if the debtor can pay, an execution is as effectual as another suit, and more expeditious."[1] The converse of the rule is true, and an attachment may be maintained when the judgment is inoperative.[2] An attachment may issue on a dormant judgment.[3]

An attachment has been sustained in Maryland against the property of a non-resident or absconding debtor based upon the transcript of a judgment rendered in another state.[4] And the same has been denied in New York.[5]

When an attachment is permitted upon a judgment, and one only of two non-resident joint debtors has been served with process and appeared, a judgment entered in such a case will not entitle the plaintiff to the issuance of a writ as upon a judgment against both debtors.[6] A judgment, by confession, in favor of *bona fide* creditors for the purpose of preferring them, and not for the purpose of hindering, or defrauding other creditors, will not sustain an attachment.[7] Pending an appeal from a judgment for the plaintiff, the enforcement of which has been suspended by a *supersedeas* bond, plaintiff can not bring an attachment suit on the judgment.[8]

A decree for alimony and allowance to children constitutes proper claims under an attachment proceeding against the property of an absconding debtor (the claims having been filed thereunder before the final judgment in the suit) for a cause which existed at the time the writ of attachment was issued.[9]

§ 24. (m) **Not on a demand where other security exists.**— The policy of the law, in most states, is that a creditor holding a security by way of "mortgage, lien or pledge upon real or personal property" shall not resort to the summary process of

1. Lee *v.* Giles, 1 Bailey (S. C.) 449.
2. Lee *v.* Giles, 1 Bailey (S. C.) 449; Clark *v.* Connor, 2 Strobh. (S. C.) 346.
3. Bridges *v.* North, 22 Ga. 52.
4. Cockey *v.* Milne, 16 Md. 200.
5. Gutta Percha, etc., Co. *v.* City of Houston, 108 N. Y. 276, 46 Hun (N. Y.) 237, 15 N. E. R. 402.
6. Oakley *v.* Aspinwall, 1 Duer (N. Y.) 1.
7. Estes *v.* Fry, 22 Mo. App. 80.
8. Johnson *v.* Williams, 82 Ky. 45.
9. Farr *v.* Buckner, 32 Ind. 382.

attachment until he has exhausted his security, consequently if a creditor have such lien for his demand he can not have attachment.[1]

The code of California forbids the issuance of an attachment when the claim is secured by mortgage or lien.[2] If the security has become valueless without any act of the plaintiff or person to whom the security was given, attachment may issue on the demand formerly secured.[3] Furthermore, if the

1. Hill *v.* Grigsby, 32 Cal. 55; Porter *v.* Brooks, 35 Cal. 199; Kinsey *v.* Wallace, 36 Cal. 462; Whitwell *v.* Brigham, 19 Pick. (Mass.) 117.

2. It requires the plaintiff to state in his affidavit that his claim is without security. Gessner *v.* Palmateer, 89 Cal. 89, 26 Pac. Rep. 789.

Where the owner of land contracts to convey it upon the payment of a certain price, for which he accepts notes, but the title is not to pass until the notes are paid, and land is, by express contract, held in pledge for such payment, the notes and contract are in the nature of a mortgage, and the lien will pass to the assignee of such note, and he can not maintain action by attachment therefor. Gessner *v.* Palmateer, 89 Cal. 89, 26 Pac. Rep. 789.

Where the plaintiff's affidavit for attachment alleged that defendant was indebted to him on a certain promissory note to the order of K, and indorsed by defendant, and defendant's motion to dissolve the attachment alleged that the debt was K's, and that he had died leaving a will, by which he made his wife executrix, and conferred on her full authority, without any order of court, to pay his just debts, for which purpose he bequeathes her a large estate; it was held that this did not give the plaintiff a lien securing his debt. Bank of California *v.* Boyd, 86 Cal. 386, 25 Pac. Rep. 20.

Where a creditor has received shares of stock as collateral security for his demand, it must be deemed to be secured by a lien. Beaudry *v.* Vache, 45 Cal. 3.

A pledge of personal property is a mortgage, the term "mortgage" meaning any security. But it must be a lien of a fixed determinate character, capable of being enforced with certainty, and depending on no conditions. Payne *v.* Bensley, 8 Cal. 260.

3. Barbieri *v.* Ramelli, 84 Cal. 154, 23 Pac. Rep. 1086.

This, however, applies only to cases where the security has so depreciated, since it was taken, as to become valueless. It does not permit one who has taken a mortgage on land to evade the provisions of the code providing that "there can be but one action for the recovery of any debt—secured by mortgage upon real estate," and that it shall be by foreclosure, to attach without showing that the land was in fact depreciated in value. Barbieri *v.* Ramelli, 84 Cal. 154, 23 Pac. Rep. 1086.

lien is merely an equitable one, liable to be defeated by alienation or incumbrance, attachment will lie.[1]

It has been said in Iowa that when the debtor gives the creditor a chattel mortgage upon property on which there is a prior lien of the same kind, without knowledge or request of such creditor and without acceptance by him, it is not such a giving of property in payment or security of a debt as to preclude the bringing of the attachment.[2] And in an action for debt and to foreclose a mortgage given as security therefor, where it was averred that the mortgaged property was insufficient to pay the debt, an attachment was issued upon good cause shown, for a sum sufficient to cover the unsecured balance.[3] In Texas the plaintiff's right to attachment is not impaired by the fact that he has collateral security for part of his debt.[4]

In Idaho the reservation of title by a vendor till the price is paid creates such a lien in the vendor's favor as will prevent the issuance by him of an attachment for his debt.[5]

In Louisiana it is provided that "a creditor by special mortgage shall have the power of sequestering mortgaged property, when he apprehends that it will be removed out of the state before he can have the benefit of his mortgage, and will make oath of the fact which induced his apprehension."[6]

§ 25. (n) **On landlord's or agricultural liens, and laborer's liens.**—What has been said in the preceding section to the effect that attachment can not be resorted to when the plaintiff's demand is secured by a lien, must not be understood to apply in cases wherein a landlord has a lien on the growing crops for the rent; or where one who has made advances to aid in producing a crop has a lien thereon for the sums ad-

1. Porter *v.* Brooks, 35 Cal. 199.

As where the purchaser has conveyed land to a third party before action brought thereon against him has been begun by the vendor, a writ of attachment may be had by such vendor. Porter *v.* Brooks, 35 Cal. 199.

2. Burrows *v.* Lehndorff, 8 Iowa 96.

3. Baldwin *v.* Buchanan, 10 Iowa 277.

4. Branshaw *v.* Tinsley, 23 S. W. Rep. 184, 4 Tex. Civ App. 131.

5. Willman *v.* Freidman, (Idaho) 35 Pac. Rep. 37.

6. Code Pr., art. 275, paragraph 6; Egan *v.* Fush, 46 La. Ann. 474, 15 So. Rep. 539.

vanced; or where a laborer has a lien on the product of his labor for unpaid wages, because in most cases such lien is enforcible by attachment under special provisions of the statute.[1]

The lien which a landlord has upon growing crops for rent that is due and unpaid may, upon proof of that fact, be enforced by attachment.[2] But an attachment against the property of the tenant generally begun before the rent is due or where there is no stipulation to pay rent before the expiration of the term, it can not be sustained; but it seems that a statutory attachment against the crops alone may be sustained.[3]

Under the Alabama code attachment may be resorted to for the enforcement of the lien created by contract on the crop and stock of another for advances to assist in making a crop in the same manner as in a case of a demand for rent. The attachment is a process to enforce the lien. Therefore, by the death of the defendant in attachment and the insolvency of his estate, the existing lien is not dissolved, as to the property subject to the contract lien, by ordering the property to be sold, when judgment is rendered for the debt or demand secured by the lien.[4]

Laborers' liens, though enforcible by "attachment," are not enforcible by the common attachment writ when another

1. Goods of a tenant, though in the hands of an officer under a distress for rent, may be attached by the same landlord for rent not yet due. Herbert *v.* Ward, 1 Cranch C. Ct. 30.

2. Rotzler *v.* Rotzler, 46 Iowa 189; Crawford *v.* Coil, 69 Mo. 588.

3. Tignor *v.* Bradley, 124 Ark. 781. See Brocket *v.* Johns, 1 Cranch C. Ct. 100.

Where the home defendant in a foreign attachment holds a lease of the absent defendant, the attachment binds only so much of the rent as is due at the time the attachment is served. Haffey *v.* Miller, 6 Gratt. (Va.) 454.

4. McKinney *v.* Benagh, 48 Ala. 358.

Where one in possession of a plantation under a conditional agreement of sale obtains advices from another for the purpose of making his crop, promising to ship such person the entire crop, and giving him a privilege on the same, but, on harvesting the crop, ships it to other merchants, the party making the advances is entitled, in an action on the indebtedness, to writs of attachment and sequestration against the person in possession. Flower *v.* Skipwith, 45 La. Ann. 895, 13 So. Rep. 152.

is provided; for example: An ordinary precept commanding the attachment of the goods or estate of the defendant will not be sufficient to "secure by attachment" a labor's lien created by the wood and lumber laws of Maine and New Hampshire.[1]

§ 26. (o) **Not on a penalty.**—It is an almost universal rule, that an attachment may not issue for the recovery of a penalty. The penalty for a violation of the United States bankrupt law, by a debtor, in making a sale of his property, is not a ground for an attachment under the state law.[2] While demands arising on a breach of a bail bond in a criminal case, and on the breach of a county treasurer's bond, have been held to be "money demands" of a proper character to sustain attachment,[3] a bail bond conditioned that if the defendant shall duly prosecute his appeal and pay the judgment, in case the same shall be affirmed, then the obligation shall be void, otherwise in full force and effect, is not a written instrument for the payment of money by the meaning of the Colorado code, which provides that "in all actions brought upon overdue promissory notes, bills of exchange, other instruments for the direct payment of money, and upon book accounts, the creditor may have a writ of attachment issued."[4] Neither is a suit on an administrator's bond a suit on a "written instrument for the direct payment of money," wherein an attachment will lie.[5] Nor is a claim arising out of the official neglect of the clerk of a court a "debt" which will support a foreign attachment. The defendant is not answerable as a debtor, but as a tort-feasor.[6]

When claims for unliquidated damages can not be recovered,[7] a writ of attachment can not issue for a penalty intended to se-

1. Bryant *v.* Warren, 51 N. H. 213.

2. Stanley *v.* Sutherland, 54 Ind. 339.

3. San Francisco *v.* Brader, 50 Cal. 506; Monterey County *v.* McKee, 51 Cal. 255.

4. Hurd *v.* McClellan, 14 Colo. 213, 23 Pac. Rep. 792.

5. People *v.* Boylan, 25 Fed. Rep. 594.

6. Dunlop *v.* Keith, 1 Leigh (Va.) 430.

7. See *ante*, section 19.

cure unliquidated damages.[1] Where it was provided by articles of agreement for the exchange of property that if either party failed to comply with the conditions of the contract, he should pay to the other a certain sum (or more if more damages should be proved) as fixed in liquidated damages, the court held that the sum named in the contract was not liquidated damages, but was in the nature of a penalty that could not be recovered by attachment.[2]

§ 27. (p) **On demands ex delicto.**—The courts and legislatures of the different states make every variety of declarations regarding the issuing of writs of attachment in actions for wrongs, from the affirmation that attachment will not be a lien for demands which arise *ex delicto*,[3] to the declaration that it will extend to all cases for the recovery of money whether sounding in tort or contract.[4]

One line of cases holds that the *form* of the action governs, and that if the action is in form *ex contractu*, attachment will lie, even though the *cause* may have originally been *ex de-*

1. Cheddick *v.* Marsh, 21 N. J. L. (1 Zab.) 463.

2. Hough *v.* Kugler, 36 Md. 186.

3. Fisher *v.* Conseque, 2 Wash. (U. S. C. C.) 382; Redwood *v.* Conseque, 2 Browne (Pa.) 62; Jacoby *v.* Gogell, 5 S. & R. (Pa.) 450; Coleman's Appeal, 75 Pa. St. 441; Barrow *v.* McDonald, 12 La. Ann. 110; West *v.* Chew, 18 La. Ann. 630; Childs *v.* Wilson, 15 La. Ann. 512; McDonald *v.* Forsyth, 13 Mo. 549; Minga *v.* Zollicoffer, 1 Ired. (N. C.) L. 278; Hadley *v.* Bryars, 58 Ala. 139.

Trover can not be commenced by attachment. Marshall *v.* White, 8 Porter (Ala.) 551; Ferris *v.* Ferris, 25 Vt. 100.

4. See *ante*, section 16; Lum *v.* The Buckeye, 24 Miss. 564; Fellows *v.* Brown, 38 Miss. 541; Pearson *v.* Gillett, 55 Mo. App. 312.

Under a statute permitting an attachment to issue on "money demands," whether arising *ex contractu* or *ex delicto*, the issuance of a writ was sustained in an action for the seduction of the plaintiff's daughter. Graves *v.* Strozier, 37 Ga. 32.

In Tennessee the statute extending the application of attachment to damages from wrongs confers the same right of action by original attachment in causes *ex delicto*, as then existed by law in causes *ex contractu*, and upholds and sustains such actions of tort as had already been brought in the ordinary mode, with ancillary attachments, lawfully issued and levied on the property of the defendant. Swan *v.* Roberts, 2 Cold. (Tenn.) 153.

licto;[1] and that if the tort is waived and the action begun in form *ex contractu*, attachment may be had.[2]

Another line of cases, in states not permitting an attachment for demands arising from torts, holds that if the gravamen of the action is tort, the process of attachment may not be resorted to, no matter what the form of the action. Therefore, in order that an attachment may be authorized in Wisconsin, the action must rest upon an indebtedness due upon the contract. Making the affidavit prescribed by the statute will authorize the issuance of the writ, but if either the declaration or the evidence makes it to appear that the true cause of action was a tort, the attachment should be immediately dismissed.[3] The California code does not allow an attachment where the gravamen of the action is tort; therefore, an attachment can not be resorted to for the recovery of money which the plaintiff entrusted to a clerk and which the defendant won from him in gambling.[4] It will be a cause of action upon a tort, and attachment will not lie, if the debtor, by false representations as to the value of the land, induced the creditor to exchange conveyances of land with him and the creditor upon discovering the fraud has tendered a reconveyance which has been refused.[5] And, furthermore, where such cause of action arises in tort, the plaintiff can not waive the tort and sue as for money had and received, and have a writ of attachment.[6]

The converse of the last rule is true, for where there is a statutory provision allowing attachment where the "damages for which the suit is brought are from injuries arising from the commission of some felony or misdemeanor," if the cause of action is shown to arise *ex contractu* it will not be sustained.[7]

Under a statute permitting an attachment to issue in a *suit pending* for the enforcement of any claim or demand whether

1. See *ante*, § 16; Elwell *v.* Martin, 32 Vt. 217.

2. Embezzlement by a clerk is a *breach of contract* of employment. *Assumpsit* is a proper action thereon, and an attachment may be sued out. Farmers' Nat. Bank *v.* Fonda, 65 Mich. 533, 32 N. W. Rep. 664.

3. Elliot *v.* Jackson, 3 Wis. 649.

4. Babcock *v.* Briggs, 52 Cal. 502.

5. Crossman *v.* Lindsley, 42 How. (N. Y.) Pr. 107.

6. Tabor *v.* Bigg, Pittsburgh, etc., Mining Co., 14 Fed. Rep. 636.

7. Deering *v.* Collins, 38 Mo. App. 80.

for debt or damages, irrespective of the cause or form of the action, whether *ex contractu* or *ex delicto*, a party can not sue out an attachment as an original process for an assault and battery, or other cause of action *ex delicto;* but it may be issued on such cause of action simultaneously with the original process and subsidiary thereto.[1]

"Injury to personal property" causes a demand *ex delicto* which, by special statute in several states, will support attachment. Under a statute permitting an attachment to issue for "injury to personal property for negligence, fraud, or other wrongful act," W sold S sixty-five barrels of whisky of extra quality, with the understanding that S should so mix the same with inferior liquor as to increase the value of the stock and, consequently, S's ability to pay. S failed to do so, but pledged the whisky to raise money from parties whose names he withheld and endeavored to conceal the whereabouts of the whisky. An attachment was sustained against S.[2]

In a state permitting an attachment for a cause of action arising from a trespass or injury "actually done to the person or property," an attachment was not sustained in an action for slander, it not coming within the letter or spirit of the act as an injury "actually done."[3]

Under a statute permitting an attachment in an action for the "wrongful conversion of personal property," a wrongful detention of personal property is of itself such a wrongful conversion as to support the action.[4]

Under a statute permitting an attachment to issue in personal actions, it was held that trespass *quare clausum fregit* is a personal action, and may be commenced by trustee process.[5]

1. Thompson *v.* Carper, 11 Humph. (Tenn.) 542.

In such case the affidavit must state the cause of action, the nature thereof, the tribunal in which it is pending, the amount of damages laid, and that the cause of action stated is just. Thompson *v.* Carper, 11 Humph. (Tenn.) 542.

2. Webb *v.* Bowler, 5 Jones (N. C.) L. 362.

3. Sargent *v.* Helmbond, 11 S. C. 219.

4. Barry *v.* Fisher, 8 Abb. (N. Y.) Pr. N. S. 369, 39 How. (N. Y.) Pr. 521. See also Shaffer *v.* Mason, 43 Barb. (N. Y.) 501.

5. Linscott *v.* Fuller, 57 Me. 406.

In cases in which an attachment is allowed on demands arising from torts, the attachment can not be sustained unless the defendant can be served with a summons within the state; for it is only in that case that the action for tort can be maintained.[1]

1. Hernstie *v.* Matthewson, 5 How. (N. Y.) Pr. 196.

CHAPTER III.

WHAT PROPERTY OR INTEREST MAY BE REACHED.

§ 28. In general.
29. What personal property or interest therein — Generally.
30. Money in specie, bank bills, stock certificates, etc.
31. Wearing apparel, jewelry, etc.
32. Crops.
33. Chattels in the hands of an agent having no property therein.
34. Chattels in the hands of a factor or agent with property therein.
35. Chattels still in the vendor's possession.
36. Chattels in the hands of fraudulent vendee.
37. Chattels in a vendee's hands on a conditional sale.
38. Chattels subject to a lien, (a) Generally.
39. (b) Chattels *in transitu*.
40. (c) Chattels in the hands of common carriers, warehousemen, collectors of duties or other depositary.
41. (d) Chattels in the hands of a bailee for hire.
42. (e) Chattels held under pledge.
43. (f) Chattels under mortgage.
44. Chattels held by an assignee.
45. Chattels held by a trustee.
§ 46. Chattels in the custody of the law.
47. Chattels owned by a copartnership, (a) Generally.
48. (b) For the firm debt, when the grounds for attachment have not arisen as to all the members.
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50. (d) Of copartnership effects after insolvency or dissolution.
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52. What real property or interest therein—Generally.
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60. Mortgagee's interest.
61. Legal title subject to the equity of redemption.
62. Interest of legatees, devisees, reversioners, remaindermen *et al.*
63. Interest in land under contract to purchase.

§ 28. **In general.**[1]—In general it may be said that any property which may be seized on execution may be taken and sold under an attachment duly issued.[2] Tangible property is the proper subject for direct attachment, and intangible property is properly subject to attachment by garnishment, as will be shown in the subsequent volume.[3] No specific tangible property can be attached unless it can be sold under the execution after a judgment is obtained.[4]

No articles or species of property, the sale of which is prohibited by law, can be attached. This is on the theory that the law will not aid a party in enforcing an illegal contract, and because such property could not be sold on execution,[5] unless there is a special statute allowing the officer to sell under legal process.[6] This rule is most frequently applied in cases, the subject-matter of which is the sale of intoxicating liquors.[7] But some cases hold that spirituous liquor is none the less property because it is illegally kept for sale and that it is attachable

1. Property sold on Sunday by a debtor to a creditor and taken into the possession of the latter will be legally in his possession against the former. Therefore it can not be attached by another creditor unless he show that the sale was fraudulent. Blass *v.* Anderson, 57 Ark. 483, 22 S. W. Rep. 94.

2. Handy *v.* Dobbin, 12 Johns. (N. Y.) 220; as to "Exempt Property" see *post*, § 64.

3. Property may sometimes be attached by trustee process, although the right to make a direct attachment exists. Balkham *v.* Lowe, 20 Me. 369.

4. Davis *v.* Garrett, 3 Ired. (N. C.) 459; Scott *v.* Scholey, 8 East. 467.

Therefore a legacy in the hands of an executor or administrator due to a married woman can not be attached for the debt of a husband—McLean *v.* McPhaul, 6 Jones (N. C.) Eq. 15—before the latter has reduced it into possession. Arlington *v.* Screws, 9 Ired. (N. C.) L. 42.

Nor can the creditor of a husband attach a judgment against a railroad company obtained by the husband for the contents of a trunk lost belonging to his wife and subject it to the payment of the husband's debt. Pierson *v.* Smith, 1 Disney (Ohio) 305.

When the attachment of the separate property of the wife of the defendant is bad under the law of the state where the action is sought to be maintained, it is not aided by the fact that such an attachment is good in the place of the domicile of the parties. Smith *v.* McAtee, 27 Md. 420.

5. Ingalls *v.* Baker, 13 Allen (Mass.) 449; Nichols *v.* Valentine, 36 Me. 22; Barron *v.* Arnold, 16 R. I. 22, 11 Atl. Rep. 298.

6. Kiff *v.* Old Colony R. R. Co., 117 Mass. 591.

7. Barron *v.* Arnold, 16 R. I. 22, 11 Atl. Rep. 298.

by a creditor of the owner.[1] That while its sale may be prohibited, yet for all other purposes it is property and liable to seizure on attachment.[2]

Goods which can not be returned in the same plight are not attachable.[3]

By the early law, only legal rights could be attached. Mere equities were not liable to be taken on execution, for where there is no legal right there is no legal remedy.[4] It is only by the later statutes that equities or rights to redeem are subject to attachment by ordinary process and no statute has authorized the attachment of such interest in personal property.[5] The attachment of such interests in land will be given subsequent attention.[6] It is sometimes difficult to determine whether the interest is a legal one or an equitable one, and to aid in this the court has said that where the interest of the debtor can be established only by resort to equity, or, in other words, when it is so situate as to require the exercise of the equity powers of the court to bring it within the reach of legal process, it is to be regarded as an equitable interest only, and is not subject to the lien of attachment.[7]

It seems to have always been the practice to permit the seizure on attachment of the property of foreigners[8] and foreign corporations,[9] and citizens of another of the United States, when such property could be found within the jurisdiction of the court, even though by an insolvent law of the state where the debtor has his domicile, his property has been assigned

1. Tucker *v.* Adams, 63 N. H. 361; How *v.* Stewart, 40 Vt. 145.

2. Monty *v.* Arneson, 25 Ia. 383.

In a jurisdiction where such an attachment was held to be void, this question arose: When can a seizure of such article upon attachment give any right to the attached officer against any person who shall take such article from his possession? Nichols *v.* Valentine, 36 Me. 22.

3. Bond *v.* Ward, 7 Mass. 123; Leavitt *v.* Holbrook, 5 Vt. 405; but as to "Garnishment," see Clark *v.* Brown, 14 Mass. 271.

4. Scott *v.* Scholey, 8 East 467.

5. Badlam *v.* Tucker, 1 Pick. (Mass.) 284; Hillman *v.* Werner, 65 Tenn. 586. See *post*, § 38.

6. See *post*, § 52.

7. Macauley *v.* Smith, 10 N. Y. S. 578; Thurber *v.* Blanck, 50 N. Y. 80; Anthony *v.* Wood, 96 N. Y. 180.

8. Barney *v.* Patterson, 6 Har. & J. (Md.) 182, note.

9. Bushel *v.* Com. Ins., 15 Serg. & R. (Pa.) 173.

for the benefit of all his creditors,[1] unless such assignment has been made effective also under the law of the state where the attachment is sued out.[2] And notwithstanding an assignment by commissioners of bankruptcy in England, an American creditor may attach the effects here, belonging to the bankrupt.[3] But property of a sister state which has been brought into this state for the public use of the former is not liable to a foreign attachment at suit of an individual.[4]

It may be said in general that attachment will reach all of the property of the debtor that is not exempt from execution.[5] But as an attachment is only a lien and not an entire subjection of the property before judgment, the private rights of the owner must be respected and the interests of the owner, which are in their nature private, must not be trespassed upon. In executing a writ of attachment, the sheriff has no power to seize correspondence belonging to the defendant. He has no authority to examine such books and papers as he may lawfully seize. He may not take copies of them, nor look into the correspondence of the defendant, or do any act in relation to the books and papers, other than simply to keep them safely; subject to the direction of the court which allowed the process.[6]

The attachment writ takes effect at its service, and only such property as the title thereto has then vested in the defendant can be effectively seized; therefore, where a merchant under a contract was to furnish supplies to the owners of a mine, and, in return, he was to receive the ore as mined, the title to the ore to vest in him on its delivery, a creditor of the mine-owners could not attach it after delivery, for the title had passed.[7] Likewise a horse sold upon the understanding that the title was not to pass until a check given for the price was honored, can not be attached by a creditor of the buyer before

1. Bizzell *v.* Bedient, 2 Law. Rep. (N. C.) 254.
2. Philson *v.* Barnes, 50 Pa. St. 230.
3. Milne *v.* Moreton, 6 Binn. (Pa.) 353.
4. Nathans *v.* Commonwealth, 1 Dall. (Pa.) 77.
5. Burdett *v.* Phillips, 78 Ky. 246.
6. Hergman *v.* Dettlebach, 11 How. (N. Y.) Pr. 46.
7. Finding *v.* Hartman, (Colo.) 23 Pac. Rep. 1004.

the check is honored, though it may have been placed in the stable at which delivery was to be made.[1] On the same principle, when N., a shipper of grain, and K., the president of a bank, agreed that K. was to own all grain bought by N. until K.'s advances were paid, N. shipped grain and drew for it through K.'s bank, receiving credits for his drafts. It was held that a car-load of grain, against which a draft had been drawn, and a shipping receipt attached, and then deposited to N.'s credit, was not subject to attachment at suit of N.'s creditors, and that it was immaterial that the draft was when returned dishonored, charged against N.[2] Again, in an attachment where the contest was as to the right of property to certain horses, which, when attached, were in possession of a liveryman, who held them as bailee for the defendant in attachment, and a few days before the levy the defendant had given a bill of sale to the claimant, who had made part payment thereon, but the defendant with the claimant's consent continued to try to sell the horses to other parties; it was held that the horses were subject to the levy.[3]

The same rule applies to title of land. Where an agent for the collection of an account takes a deed of land in satisfaction thereof without authority so to do, and the land is attached after the recording thereof, but before the ratification by the creditor, the ratification will not date back to the taking of the deed, and defeat the rights acquired by the intervening attachment.[4] This question of ownership will receive more particular attention subsequently in connection with the kinds of property or interest to be reached. But it may be well to suggest here that there are times when a man's property may not be reached by attachment; for example, a qualified elector's property has been held to be exempt from attachment on election day, and the day preceding and following.[5]

1. Gould *v.* Howell, 32 Ill. App. 349.

2. Rumsey *v.* Nickerson, 35 Ill. App. 188.

3. Floege *v.* Wiedner, 14 S. W. Rep. 132, 77 Tex. 311.

4. Kempner *v.* Rosenthal, 81 Tex. 12, 16 S. W. Rep. 639. See also Macauley *v.* Smith, 57 Hun (N. Y.) 585 (33 N. Y. State Rep. 745); Finding *v.* Hartman, 14 Colo. 596; Hewitt *v.* Durant, 78 Mich. 186.

5. Knight *v.* Richmond, 2 R. I. 75.

§ 29. **What personal property or interest therein—Generally.**—As shown in the preceding chapter[1] an equitable interest in personal property can not be the subject of an attachment. Legal title to personal property in the defendant is a necessary condition precedent to the subjection of personal property to the lien of attachment. It frequently happens that, although the defendant may have the legal title to the personal property, yet the property can not be subjected to the lien of attachment, because of the rights or liens of other persons, as hereinafter shown.[2] It is a universal rule that every species of personal property that may be sold on execution may be the subject of attachment; but attachment by garnishment is the proper proceeding to secure a lien on those demands for which the *defendant* in attachment could maintain the action of debt, or *indebitatus assumpsit*,[3] and attachment by seizure, for all species of tangible personal property.[4] Therefore, hay in a barn may be attached and removed.[5] Carpenter's tools may be sold under an original attachment when not exempt by statute.[6] A boat, cable and anchor may be levied upon and separated from the vessel when she is lying at a wharf, unless the boat is in actual use, and necessary to the safety of the vessel.[7] Promissory notes are personal property, and when they can be reached, may be the subject of attachment and execution.[8] Locomotive engines, freight and passenger cars of railroad corporations, when not in actual use, are liable to attachment like other personal property.[9] A stage coach, with horses thereto harnessed, when not yet started on the journey or after having arrived at its usual stopping place, and driven into an adjoining yard (though the passengers are not distributed), is liable to be attached.[10] Cordwood and charcoal in large quantities

1. *Ante*, § 21.
2. See *post*, § 38.
3. Cook *v.* Walthall, 20 Ala. 334.
4. Mississippi code making liable to the debts of a trader all property "used or acquired in his business," held to apply to horses placed in the custody of a horse trader, to be sold by him as part of his stock. Shannon *v.* Blum, 60 Miss. 828.
5. Campbell *v.* Johnson, 11 Mass. 184; Barrett *v.* White, 3 N. H. 210.
6. Martindale *v.* Whitehead, 1 Jones (N. C.) L. 64.
7. Briggs *v.* Strange, 17 Mass. 405.
8. Mower *v.* Stickney, 5 Minn. 397.
9. Boston, etc., R. R. Co. *v.* Gilmore, 37 N. H. 410.
10. Potter *v.* Hall, 3 Pick. (Mass.) 368.

may be effectually attached, even without removal.[1] And, although the charcoal may not be entirely completed, yet if so far completed as to require no further attention or labor, and so far progressed as to be entirely burned to coal, though requiring some labor and skill to preserve it properly, the sheriff may, if he see fit, attach and take possession of the coal on a writ against the owner and run the risk of being able to keep it properly.[2] The property in a newspaper office may be the subject of an attachment.[3] Ships, boats and vessels are subject to attachment in a personal suit against a captain or owners, the same as any other species of property.[4] There is sometimes a question of jurisdiction whether the same is exclusively in the admiralty courts or the state courts, and many states have special statutes relating thereto.[5] But a steamboat owned by residents of one state, and engaged in trade, making regular trips between a port in that state and a port in a different state, does not fall within the provisions of the attachment laws, authorizing an attachment where the debtor is about to remove himself or property out of the state.[6]

§ 30. Money in specie, bank bills, stock certificates, etc.—Money in the actual possession of the defendant is liable to attachment if the officer can seize it without violating the personal security of the debtor.[7] But money in the hands of another person is not usually attachable except by garnish-

1. Reed *v.* Howard, 2 Metc. (Mass.) 36.

If the notice required by the statute in case of cumbrous articles is given.

2. Hale *v.* Huntley, 21 Vt. 147.

3. But in Massachusetts the statute prescribes that this may not be done within forty-eight hours of the issue of any edition of the newspaper, except on demand on the owners or managers thereof twenty-four hours prior thereto, for sufficient property to equal the writ. Act June 3, 1890.

4. Haeberle *v.* Barringer, 29 La. Ann. 410.

5. In Tennessee all that is necessary to fix the jurisdiction is the levy of the attachment and that the debt be contracted in the state. Hill *v.* Mills, 9 Humph. (Tenn.) 629.

6. Lyons *v.* Mason, 4 Cold. (Tenn.) 525. See also the special statute of the state in which the action is to be brought, regarding the attachment of ships, boats and vessels.

7. Prentiss *v.* Bliss, 4 Vt. 513; Harding *v.* Stevenson, 6 Har. & J. (Md.) 264.

ment, for the reason that it is not the property of the defendant until it is paid over to him. It is only an indebtedness.[1] But money paid in fraud to an assignee may be attached because the *property* did not pass. When money in specie is seized in an original attachment there is no need of sale.[2] It is said that money in the hands of an officer may be subjected to a writ of attachment subsequently placed in his hands, if he make proper appropriation; but such officer is not bound to make any appropriation.[3]

Bank bills or money, as well as any other thing of a tangible nature, may be the subject of an attachment,[4] and may be seized and sold,[5] and so may United States treasury notes.[6]

Many states permit the attachment of shares of stock in a corporation to be attached by a creditor of him who holds the legal title to the same,[7] even though they may appear upon the books of the company to be owned by another.[8] And some states provide specially for such attachment,[9] but many others hold that such stock is not attachable, on the principle that it is merely a chose in action, or in the nature of a chose in action, and that the owner has no legal estate in the property of the corporation. The corporation owns it all.[10] And further, that the attachment of it by a creditor of an individual stockholder will have no effect to incumber the property of the corporation, or to prevent it from assigning the property.[11]

1. Turner *v.* Fendall, 1 Cranch. (U. S. C. C.) 117.

2. Sheldon *v.* Root, 16 Pick.(Mass.) 567.

3. State *v.* Taylor, 56 Mo. 492. See "Property in Custody of Law" *post*, § 46.

4. Handy *v.* Dobbin, 12 Johns. (N. Y.) 220.

5. Spencer *v.* Blaisdell, 4 N. H. 198.

6. State *v.* Lawson, 7 Ark. 391.

7. Van Norman *v.* Circuit Judge, 45 Mich. 204, 7 N. W. Rep. 796; Gypsum Plaster and Stucco Co. *v.* Kent Circuit Judge, 97 Mich. 631, 57 N. W. Rep. 191.

8. Tufts *v.* Volkening (Mo. Sup.) 27 S. W. Rep. 522; s. c. 51 Mo. App. 7.

9. How to make the levy, see *post*, § 208, 209.

10. Haley *v.* Reid, 16 Ga. 437; Arnold *v.* Ruggles, 1 R. I. 165; Merchants' M. I. Co. *v.* Brower, 38 Tex. 230; Morgan *v.* Railway Co., 1 Woods (U. S.) 15; Bogert *v.* Parry, 17 Johns. 351; Ingalls *v.* Lord, 1 Cowen (N. Y.) 240; Harding *v.* Stevenson, 6 Har. & J. (Md.) 264.

11. Gottfried *v.* Miller, 104 U. S. 521. Neither shares in a bank nor shares in a public library are attachable. Denton *v.* Livingston, 9 Johns. (N. Y.) 96.

Whether stock certificates may be reached by making the corporation a garnishee will be made to appear in the second volume of this work.

§ 31. **Wearing apparel, jewelry, etc.**—Wearing apparel, like other personal property, when not exempt from execution, may be seized on attachment; but neither an assault, nor a trespass, nor a fraud, must be perpetrated on the owner to get possession of it. A watch, being handed to an officer by the debtor, merely to be looked at, and being still annexed to a guard which passes around the debtor's neck, is not liable to attachment; and an officer who severs the guard and attaches the watch is a trespasser.[1] Neither can money nor other chattels, taken from an individual by an officer searching him, be seized. They are in custody of the law and can not be attached.[2] Some distinction has been made as to whether such property is or is not the subject-matter of another suit pending, but a watch delivered to the officer without objection by one arrested on a charge of larceny of other property, can not be attached in the officer's hands.[3] Nor can a watch taken from a prisoner who was arrested on a warrant merely for the purpose of getting such watch, in order that it may be attached.[4] The rule is general in regard to money, wearing apparel, and jewelry, that the officer, having taken charge of the property in the performance of his official duty, the property is in custody of the law and can not be attached.[5]

§ 32. **Crops.**—Aside from the lien which the landlord has for rent upon growing crops of the tenant, and which is controlled by special statutes, emblements or annual crops may be attached as personal property when they have been severed from the realty;[6] and generally when they are ripe and fit for har-

1. Mack *v.* Parks, 8 Gray (Mass.) 517.

2. Dahms *v.* Sears, 13 Ore. 47. See also *post*, § 46.

3. Morris *v.* Penniman, 14 Gray (Mass.) 220.

4. Closson *v.* Morrison, 47 N. H. 482. See as to "Fraudulent Seizure," *post*, §§ 204, 207.

5. Robinson *v.* Howard, 7 Cush. (Mass.) 257.

6. Garland *v.* Hibborn, 23 Me. 442.

vest. The rule includes tobacco stored in barns, hanging on poles, in process of curing, although in such condition that it can not be moved without damage; for unlike hides in a tan-vat, or sheaves in a stook, the tobacco can be returned in the same plight.[1] And hay, or grain in the straw, may generally be attached by taking constructive possession thereof, in compliance with the local statutes in regard to the giving of notice, and it is not generally necessary that the officer in such case see the property or go near it. It is usually sufficient if a copy of the attachment be left by him with the debtor at any time before the legal time of service of the writ has expired.[2]

In the absence of special statute, the attachment of crops not severed from the freehold may be attached if they are fit for harvest, but to make a valid attachment they must be severed from the freehold, and kept in the officer's custody.[3] Under a special statute regulating the attachment of property not susceptible of manual delivery, an unripe growing crop may be levied upon by giving the statutory notice and serving copies of the writ upon the defendant, although the sheriff do nothing further until the crop is ripe, when he gathers it.[4]

Standing grass is not an emblement and is not subject to attachment or execution.[5] It is part of the real estate.[6]

The landlord's interest in a growing crop which the tenant is raising on the shares can not be attached;[7] even when strengthened by reason of his lien for rent and advances.[8] Nor can crops grown upon land by a person in the actual adverse

1. Cheshire National Bank *v.* Jewett, 119 Mass. 242.

2. Putnam *v.* Clark, 17 Vt. 82.

And such officer may maintain trespass against another officer who subsequently attaches and removes the property by virtue of a legal writ against the same debtor. Putnam *v.* Clark, 17 Vt. 82.

Hay is not attachable at suit of the lessee's creditors, it seems, if "all of the hay and straw is to be used on the farm" by provision in the lease. Potter *v.* Cunningham, 34 Me. 192; Coe *v.* Wilson, 46 Me. 314; Phillips *v.* Pearson, 55 Me. 570.

3. Heard *v.* Fairbanks, 5 Metc. (Mass.) 111.

4. Raventas *v.* Green, 57 Cal. 254.

5. Rogers *v.* Elliot, 59 N. H. 201; s. c. 47 Am. Rep. 192; Norris *v.* Watson, 22 N. H. (2 Foster) 364.

6. As to attachment of land, see *post*, § 52.

7. Howard County *v.* Kyte, 69 Iowa 307.

8. Sturnes *v.* Allen, 58 Ala. 316.

possession thereof be attached as the property of the legal owner of the land.[1]

The growing crop of a tenant is in most states subject to attachment by the landlord for rent due, but such attachment is properly the enforcement of a lien created by special statute, and its consideration has no proper place in a general work on attachment.

§ 33. **Chattels in the hands of an agent having no property therein.**[2]—As a general rule property need not be in the possession of the defendant, but may be seized wherever it is found.[3] Therefore chattels in the possession of an agent may generally be attached, unless some constructive possession or lien has been acquired by some third persons, or some facts have occurred which create an obligation on the part of the agent to hold them for such third persons, or which divest the debtor of his control over them.[4] And this is true even though chattels have been by the agent removed to his house without authority from the owner, in pledge for a debt due from such owner.[5] Even property attached on mesne process, and delivered to a receiptor, which is not afterwards taken on execution and disposed of in due course of law, is subject to foreign attachment, in the receiptor's hands, at the suit of another creditor. Being in the hands of the agent when the last writ is served the lien is fixed, and if thereafter an application of the property be made to the payment of the first attaching creditor's debt, the receiptor is chargeable for the value of the property in his hands at the time of the service.[6] It seems, however, that the agent must be in possession of and have the actual control of the property, for where a

1. Smith *v.* Cunningham, 67 Cal. 262.

2. As to attaching property in the hands of an agent having a lien for advances see next succeeding section.

3. Graighle *v.* Notnagle, Peters C. C. 245; Livingston *v.* Smith, 5 Peters (U. S.) 90.

4. Goodhue *v.* McClarty, 3 La. Ann. 56.

5. Swett *v.* Brown, 5 Pick. (Mass.) 178. As to the attachment of property properly delivered as a pledge and subject to lien, see *post*, § 38.

6. Cole *v.* Wooster, 2 Conn. 203.

small trunk was deposited in the vault of a bank for safe keeping merely by consent of the officers who were ignorant of its contents and had no authority to open it for the purpose of acquiring such knowledge, it was held that neither the bank nor its officers could be charged by process either for the contents of the trunk or for the bank itself.[1]

There is, nevertheless, one exception to the rule that property in the hands of an agent who has no lien thereon may be attached. This exception is made by the United States statute,[2] providing that money due or to become due to a pensioner of the United States is exempt from execution or attachment while in the hands of the distributing officer or agent for distribution or while in course of distribution to such pensioner, but it has been almost universally held that after such money has come into the actual possession of the pensioner it is not exempt from execution,[3] and that it is then liable like any other fund of the debtor.[4] It is not exempt in the hands of a bailee for safe keeping.[5] Nor is a note exempt from attachment which was given for the loan of such fund.[6] Nor is a homestead purchased with such fund exempt from attachment sued out on a debt incurred prior to the purchase of such homestead.[7] And it has been further held that where the fund has been received and deposited in a bank in the name of the pensioner's wife it is still the property of the pensioner and liable in attachment to satisfy his debt.[8]

Property in possession of an agent can not be subjected to an attachment for the debt of the agent where he has no legal property therein.[9]

1. Bottom *v.* Clarke, 7 Cush. (Mass.) 487; Gregg *v.* Nilson, 1 (Pa.) Legal Gaz. Rep. 128.

2. Section 4747, U. S. Rev. St.

3. Frank *v.* Garcelon, 77 Me. 25; Folschow *v.* Werner, 51 Wis. 85; Triplett *v.* Graham, 58 Iowa 135.

4. Jardain *v.* Fairton, etc., Asso., 44 N. J. L. 376; Webb *v.* Holt, 57 Iowa 712; Carny *v.* White, 27 Kan. 319; Martin *v.* Hurlburt, 60 Vt. 364.

5. Rozelle *v.* Rhodes, 116 Pa. St. 129.

6. Baugh *v.* Barrett, 69 Iowa 495.

7. Foster *v.* Byrne, 76 Iowa 295.

8. Spelman *v.* Aldrich, 126 Mass. 113, but see Clark *v.* Ingraham, 15 Phila. (Pa.) 646.

9. See as to factors *post*, § 34.

A father, by agreement, was to carry on business in the name and on account of his son, as his agent, for one-

§ 34. **Chattles in the hands of a factor or agent with a property therein.**—Since an attaching creditor of the principal can get no better right in chattels than his debtor had, it follows that if the transaction be such that, as between the principal debtor and his agent or factor or third persons, the debtor has lost his right to control the specific property, it can not be attached by his creditors.[1] When a debtor has consigned goods to a factor with instructions that they should be sold and the proceeds be applied to the payment of third person's demands, both property and proceeds are beyond the control of the debtor and can not be attached for his debt;[2] and the same rule applies where goods have been consigned without instructions and such orders are subsequently given and accepted.[3] But it is said that a debtor will not be permitted to tie up his property for an indefinite length of time by placing it in the hands of a factor, and that under sufficiently provocative circumstances goods so placed may be seized to satisfy the debt of the owner.[4] When the agent, commission merchant, or other factor has a right to sell the goods and collect for them in his own name a creditor of the owner can not attach them.[5] And should they be attached the factor may bring replevin therefor.[6]

In a state in which a seizure on attachment of a consignment

half the profits and without putting any capital into the concern, he did so; the business yielded no profits, no setlement of accounts was ever made, and it was held that the father had no attachable interest in the stock. Blanchard *v.* Coolidge, 22 Pick. (Mass.) 151.

Where he has an interest see "property owned by copartnership," *post*, § 47.

1. Cammack *v.* Floyd, 10 La. Ann. 351.

2. Cutters *v.* Baker, 2 La. Ann. 572; Oliver *v.* Lake, 3 La. Ann. 78; Hopkins *v.* Pratt, 7 La. Ann. 336; Burnside *v.* McKinley, 12 La. Ann. 505.

3. Dolsen *v.* Brown, 13 La. Ann. 551.

But a contrary rule applies where the surplus is returnable to the consignor and the agent has no special property therein. Rollins *v.* Watson, 8 La. Ann. 435.

4. Gaty *v.* Franklin Ins. etc., Co., 12 La. Ann. 272; Bullit *v.* Walker, 12 La. Ann. 276.

5. Lambeth *v.* Turnbull, 5 Rob. (La.) 264; Skillman *v.* Bethany, 2 Martin (N. S.) (La.) 104.

6. Brownell *v.* Carnley, 3 Duer (N. Y.) 9; Sewall *v.* Nichols, 34 Me. 582.

And his right to bring such action will not be defeated by his having become the receiptor of the goods to the attaching officer. Sewall *v.* Nichols, 34 Me. 582.

in the hands of the consignee is not attachable at the instance of a creditor of the consignor because the consignee has a qualified property therein, it has been suggested that the proper procedure is by garnishment of the consignee.[1] If, however, the factor sells goods and collects therefor in his own name without disclosing his principal, it is said that the rights of third persons with whom he deals will be protected.[2]

The interest of an agent or factor in personal property to be sold by him when he is to retain as his commission the excess of the proceeds above a certain sum is not such an interest as can be attached or levied upon.[3] And where chattels are placed in the custody of an agent to be sold by him as a part of his stock, or under circumstances that make them to appear to be his, and thus furnish him a basis of credit, they become liable for his debts and are to be treated as his property.[4]

§ 35. Chattels still in the vendor's possession.—A vendor having parted with the title to the property generally has no attachable interest; but where it is still in his possession, having never been delivered, it is attachable.[5] Merchandise sold on credit and still in possession of the vendor is attachable for his debts, notwithstanding the vendee may have given notes for the price.[6] A mere contract to buy goods, unaccompanied by payment, will not pass title as against an attaching creditor.[7]

A manufactured article which is still in the possession of the

1. Schepler *v.* Garriscan, 2 Bay (S. C.) 224; Mitchell *v.* Byrne, 6 Rich. L. (S. C.) 171.

2. 7 Term (Eng. K. B.) 360; 3 Bingh. (Eng. C. P.) 139; 6 Maule & S. (Eng. K. B.) 14.

3. Vose *v.* Stickney, 8 Minn. 75; Shaughnessy *v.* Lininger and Metcalf Co., 34 Neb. 747, 52 N. W. Rep. 717; Adoue *v.* Jemison, 65 Tex. 680.

4. Shannon *v.* Blum, 60 Miss. 828. This is especially provided for by statute in Mississippi. Shannon *v.* Blum, 60 Miss. 828.

5. Burnell *v.* Robertson, 5 Gilm. (Ill.) 282; Rogers *v.* Vail, 16 Vt. 327.

Goods sold to a salesman in the employ of the vendor remaining in the vendor's store (and which, in the course of trade, is replenished through purchases made by the vendor with money turned over to him by the vendee as proceeds of sales of these goods) are attachable at suit against the vendor, and so are the new goods as well. Franklin *v.* Gumersell, 11 Mo. App. 306.

6. Lee *v.* Bullard, 3 La. Ann. 462.

7. Taacks *v.* Schmidt, 18 Abb. (N. Y.) Pr. 307.

manufacturer in an unfinished state is attachable by his creditors.[1]

Property conveyed by a deed of trust and still remaining in possession of the grantor after default made, is not subject to be levied upon by attachment, when the deed gives the trustee power to sell so much of the property as will pay the demands then due; he has parted with the control of it.[2]

§ 36. **Chattels in the hands of a fraudulent vendee.**—Chattel property in the hands of a fraudulent vendee may be attached at suit of the vendor's creditors,[3] because the title thereto has never passed from the vendor.[4] This principle applies so long as the chattel remains in the vendee's possession but not after he has sold it to innocent third parties or it has been attached or seized on execution against him.[5] But, though the sale vests title in the innocent purchaser, the money arising out of such a sale of the property will be liable to attachment

1. Manchester Mills *v.* Rundlett, 23 N. H. (3 Fost.) 271.

Even where one contracted to build a house for another, on the land of the latter, fitted the blinds to the windows and took them off to paint them, according to the contract, it was held that they were his own property, while in his hands unfinished, and liable to be attached for his debts. Manchester Mills *v.* Rundlett, 23 N. H. (3 Fost.) 271.

2. Thompson *v.* Thornton, 21 Ala. 808.

This is true, although only a portion of the demand secured is due and unpaid at the time of the levy of the attachment, and the property conveyed greatly exceeds the sum due, Thompson *v.* Thornton, 21 Ala. 808.

What is not such a parting with the property in the case of a vessel, see Spring *v.* Baker 8 Allen (Mass.) 267.

What assignment will pass title to a ship at sea, see Arnold *v.* Elwell, 13 Me. 261.

3. Starr *v.* Tracy, 2 Root (Conn.) 528; Pruden *v.* Leavensworth, 2 Root (Conn.) 129; Ketchum *v.* Allen, 46 Conn. 414.

As to lands held under a fraudulent conveyance, see Risley *v.* Welles, 5 Conn. 431; and *post*, § 54.

4. The New York code authorizes the sheriff to seize any property which the defendant has disposed of with intent to defraud his creditors. Rinchey *v.* Stryker, 28 N. Y. 45, 31 N. Y. 140.

A sheriff may in an action against him for wrongful attachment show that the conveyance under which the plaintiff claims was fraudulent as against creditors. Hall *v.* Stryker, 27 N. Y. 596. See *post*, "Liability of Execution Officer." Skinner *v.* Oettinger, 14 Abb. (N. Y.) Pr.109; Bentley *v.* Goodwin, 15 Abb. (N. Y.) Pr. 82.

5. Gibbs *v.* Chase, 10 Mass. 125.

of the creditors.[1] Likewise, goods fraudulently conveyed to a third person may be subjected to the claims of *bona fide* creditors, in the hands of a garnishee.[2]

Mortgaged chattels which are sold by fraudulent collusion between the mortgagor and the mortgagee so as to prevent any surplus proceeds from arising, although there was no fraud in making the mortgage, comes within the Illinois statute rendering property sold with intent to hinder or delay creditors liable to attachment.[3] But under a statute permitting an attachment only "in an action upon a contract, express or implied," an attachment in an action founded on vendee's fraud and collusion with the plaintiff's debtor, whereby the latter's property was put out of reach of his creditors, gives the court no jurisdiction to render even a judgment *in rem* against the property of a non-resident who has not been personally served.[4]

§ 37. **Chattels in a vendee's hands on a conditional sale.**—Where personal property is sold, upon the express condition that the title shall not vest in the purchaser until the price agreed upon is paid, the purchaser has no attachable interest in the property or its increase until performance of the condition.[5] He acquires no attachable interest by paying a portion only of the purchase-money.[6] And in order to enable a creditor of the vendee to attach and hold the property discharged from the claim of the vendor, he must pay or tender to the vendor

1. Dicken *v.* Hays, (Pa.) 7 Atl. Rep. 58.

An attachment being only authorized where the relation of debtor and creditor exists, it will not lie to subject property which has been bought with money stolen from the plaintiff, that being a case arising *ex delicto*, in which the tort can not be waived. Union Bank *v.* Baker, 8 Humph. (Tenn.) 447.

2. Franklin *v.* Larabee, 1 Root (Conn.) 488.

Property fraudulently sold, which has been attached in the hands of a fraudulent vendee, and by him replevied, is liable to a second attachment, at the suit of another creditor of the vendor. Jacobi *v.* Schloss, 7 Coldw. (Tenn.) 385.

3. Laflin *v.* Central Pub. House, 52 Ill. 432. See also "Ground for Attachment," *post*, § 125.

4. Mudge *v.* Steinhart, 20 Pac. Rep. 147, 78 Cal. 34.

5. Buckmaster *v.* Smith, 22 Vt. 203; Hunt *v.* Douglass, 22 Vt. 128.

6. Smith *v.* Foster, 18 Vt. 182.

the amount of his claim.[1] But the statute does not confer on the conditional buyer of personal property an attachable interest therein, when none of the purchase-money thereof has been paid by him.[2] It is said that where one purchases the interest of both the vendor and the vendee in the property which was the subject of such conditional sale, he will hold it free from a subsequent attachment at suit of a creditor of the conditional vendee, notwithstanding the purchaser may have allowed the property to remain in the conditional vendee's possession under a new contract of bailment with him.[3]

The following is given as an example of what is such a conditional sale as to defeat an attachment suit against the vendee in possession :

By a written contract A agreed to let, and B agreed to hire, a carriage and horses belonging to A for a period of eight months at a rental of $12 per week payable weekly, at the end of which time B was to become the owner of the carriage and horses, should the rent be paid according to contract; but in default thereof A was to have the right to take immediate possession and to retain the payments already made. B made several payments and then made default in payment. The property was attached by one of B's creditors. A brought replevin, in which suit it was found as a matter of fact it was the intent of the parties to the contract that the title should not pass to B until full payment was made. It was held :

(1) That the contract was not a sale, but only an executory agreement for a future sale upon the performance of the conditions named.

(2) That A had the right of possession upon default of B, without previous demand.

(3) That the interest of B in the property in question could not be reached by attachment for his debt.[4]

1. Hefflin *v.* Bell, 30 Vt. 134.
And that, in Vermont, within the time prescribed by statute. Hefflin *v.* Bell, 30 Vt. 134.

2. Rowan *v.* State Bank, 45 Vt. 160, 195.

3. Wilder *v.* Stafford, 30 Vt. 399.

4. Hughes *v.* Kelly, 40 Conn. 148.
In another instance a firm composed of C and P bought and took possession of the goods on the promise that C was to pay one-half the price, which

Property in possession of a conditional vendee before condition broken is also beyond the reach of attachment at suit of a a vendor's creditors upon a contract of conditional sale, upon which the purchaser has paid a part of the purchase-price, agreeing to pay the remainder. The seller agreeing to convey the title when paid, such conditional purchaser has a good equitable title as against an attaching creditor of the seller, even though such creditor have no notice of the sale, and a payment by the purchaser of the remainder of the price and his acceptance of a deed without actual notice of the attachment vests in him the legal title also.[1]

§ 38. **Chattels subject to a lien—(a) Generally.**—There is such contrariety in the laws of the different states relating to the attachment of personal property on which some third party holds a lien, that it is difficult to lay down any rule that will be universal. Generally, chattels subject to a lien can not, unless by virtue of a special statute, be attached. But this is for the protection of the party having the lien, and if he waive his objection to the attachment, it does not lie in the mouth of the general owner to complain. Such an attachment is not void, but only voidable at the election of the possessor of the lien.[2] Particular instances in which the various kinds of liens prevent an attachment will be pointed out in the succeeding five sections.

The interest possessed by one having a lien upon the property is not subject to attachment,[3] unless the holder of the lien has also the possession of the property, with a qualified interest therein.[4]

he did; that P was to pay the other half of the price, which he did not; and that the vendors were to retain an interest in the moiety until it was paid for. It was nevertheless held that an attachable interest passed to the vendee firm. Kent *v.* Porter, 18 N. H. 50.

1. Burke *v.* Johnson, 37 Kan. 337, 15 Pac. Rep. 204.

2. Meeker *v.* Wilson, 1 Gallison (U. S. 1st Dist.) 419; Clement *v.* Little, 42 N. H. 563.

3. Adoue *v.* Jemison, 65 Tex. 680; Kittredge *v.* Sumner, 11 Pick. (Mass.) 50.

4. See *post*, § 41.

§ 39. (b) **Chattels in transitu.**—Property in the hands of a common carrier, consigned to an insolvent vendee, is still subject to the vendor's right of stoppage *in transitu* and can not be attached as the property of the consignee,[1] so as to affect the vendor's right of stoppage *in transitu*.[2] But should the creditor conclude to take such chance he must then pay the carrier's charges before attaching, and should the vendor then stop them, the attachment plaintiff will have to pay the price before he can acquire a right of property therein.[3]

It has been well said that when goods are shipped by order of the consignee and for his account, then he sustains the relation of a purchaser, and the moment the goods are delivered to the carrier they have passed from the seller and are the property of the buyer, subject to the seller's right of stoppage *in transitu*, and may be subjected to an attachment at suit of the buyer's creditor, but when goods are shipped without order and on account of the shipper, he sustains the relation of principal and the consignee that of an agent or factor, and the shipper continues to be the owner, and an attachment will not lie at suit of a creditor of the consignee, but will at suit of a creditor of the shipper.[4] As another test of the right to maintain attachment, it is said that where the shipper alone is entitled to the bill of lading, the right of possession is in him and goods can not be attached at suit of a creditor of the purchaser.[5]

If the consignee is insolvent he will not be allowed to assign the incoming goods to a friend, with instructions to receive them for him, to the detriment of his attaching creditors.[6]

1. Lane *v.* Jackson, 5 Mass. 157; Bates *v.* New Orleans, etc., R. R. Co., 4 Abb. (N. Y.) Pr. 72, 13 How. Pr. 516.

2. Buckley *v.* Furniss, 15 Wend. (N. Y.) 137; Seymour *v.* Newton, 105 Mass. 272; O'Brien *v.* Norris, 16 Md. 122; Morris *v.* Shryock, 50 Miss. 590; Schwabacher *v.* Kane, 13 Mo. App. 126.

And a vendor with right of stoppage *in transitu* may maintain trover for them against an officer taking possession of them under attachment. Inslee *v.* Lane, 57 N. H. 454.

3. Kelly *v.* Deming, 2 McCrary 453; Wolfe *v.* Crawford, 54 Miss. 514.

Common carriers, having in their possession a sealed package of money belonging to a resident of another state, who appeals and answers in the action, may be held as garnishees. Adams *v.* Scott, 104 Mass. 164.

4. Dickman *v.* Williams, 50 Miss. 500.

5. Jones *v.* Bradner, 10 Barb. (N. Y.) 193. See, also, § 40.

6. Scolfield *v.* Bell, 14 Mass. 40.

When the personal property has come into the actual or constructive possession of the consignee, so that the title has passed to him upon the sale and delivery, it is then, of course, subject to attachment at suit of the vendee's creditors.[1]

§ 40. (c) **Chattels in the hands of common carriers, warehousemen, collectors of duties, or other depositary.**—An attaching creditor gets no greater right than the debtor had at the time of the seizure,[2] unless he can show fraud or collusion by which his rights have been impaired.[3] Therefore where an owner can not take possession of the goods his creditor can not attach.[4] And, conversely, whenever the owner is in a position to sell or deliver, the creditor may seize by attachment.[5]

Goods that have been shipped can not be attached by a creditor of the consignor after the bill of lading is in the hands of the consignee;[6] for where the shipper has lost all control over the goods and can not change their destination his creditor can not attach them for his debt.[7]

No person can attach property in the hands of a carrier without paying such carrier his legal freight and charges;[8] not even the United States government.[9] And especially is this true if the carrier has made advances on such goods.[10] And where an officer, in attaching goods in the hands of a common carrier, pays to him his freight and charges, the officer is subrogated to the rights of the carrier in regard to his

1. What is such constructive possession of property on board cars, see Hatch *v.* Bayley, 12 Cush. (Mass.) 27.

What is not such constructive possession of personal property on board cars, see Hatch *v.* Lincoln, 12 Cush. (Mass.) 31.

2. Adoue *v.* Seeligson, 54 Tex. 593; Mann *v.* Adams, 32 Iowa 165.

3. Samuels *v.* Agnew, 80 Ill. 553.

4. Lambeth *v.* Turnbull, 5 Rob.(La.) 264.

5. Oliver *v.* Lake, 3 La. Ann. 78.

6. McNeill *v.* Glass, 1 Martin (La.) N. S. 261.

7. Babcock *v.* Malbie, 7 Martin N. S. (La.) 137; Urie *v.* Stevens, 2 Rob. (La.) 251; Stephenson *v.* Walden, 24 Iowa 84.

8. Wolfe *v.* Crawford, 54 Miss. 514.

A captain of a ship was allowed to retain goods on board the ship, to satisfy his private demands against the owner, as against attaching creditors of the owner. Parker *v.* M'Iver, 1 Desau. (S. C.) 274.

9. De Wolfe *v.* Dearborn, 4 Pick. (Mass.) 466.

10. Brownell *v.* Carnley, 3 Duer (N. Y.) 9.

lien.[1] Likewise goods held by a collector of revenues to enforce payment or security for duties can not be attached by the importer's private creditor.[2]

Goods stored in a warehouse are subject to the warehouseman's lien, and can neither be attached at suit of the owner's creditor, nor at suit of the warehouseman's creditors; but if money for the storage of such property be paid to the officer having possession under such an attachment, it will be liable to attachment.[3] This comes as near to showing that an agent or factor has an attachable interest in the property in his possession as any case we have seen, but in fact it only goes to the principle that the property of the debtor (warehouseman) may be seized wherever found.[4]

§ 41. (d) **Chattels in the hands of a bailee for hire.**—It is well settled that whenever the bailee has a right to retain the property in his hands until his lien thereon is satisfied, the property can not be attached at suit of the bailor's creditors.[5] So, too, where his contract of bailment gives him the right of possession for a specified time, the property can not be attached at suit of the bailor's creditors before the expiration of that time.[6] Where cattle were leased for a term of years it was said an attachment of them was invalid even though a sale thereunder was made subject to the lessee's right to retain the possession of the cattle.[7]

Where the bailee has more than a mere lien and right of possession, that is to say, where he has a qualified property therein, his interest is attachable. The interest of the bailee in a chattel leased to be used by him for a certain time is at-

1. Thompson *v.* Rose, 16 Conn. 71. It has been once said that non-resident common carriers can not be proceeded against by foreign attachment for the loss of a trunk within the state. Porter *v.* Hildebrand, 14 Pa. St. 129.

2. Dennie *v.* Harris, 9 Pick. (Mass.) 364; Dennie *v.* Harris, 3 Pet. (U. S.) 292.

3. First Nat. Bank *v.* Hanchett, 126 Ill. 499.

4. Wheeler *v.* Smith, 11 Barb. (N. Y.) 345; Spencer *v.* Blaisdell, 4 N. H. 198.

5. Truslow *v.* Putnam, 4 Abb. C. of A. 425; Ordway *v.* Wilbur, 16 Me. 263; Hartford *v.* Jackson, 11 N. H. 145.

6. Hartford *v.* Jackson, 11 N. H. 145.

7. Smith *v.* Niles, 20 Vt. 315.

tachable,[1] unless his contract for use is without covenant for compensation.[2] In a well-considered case in Pennsylvania where A delivered cattle to B to handle and graze them for one year, under an agreement that he should receive all that they might produce on sale over and above the first cost and interest, it was held that B had a qualified property in the herd while in his possession which was attachable by his creditor. The court said that he could almost be considered as the purchaser and owner of the cattle subject only to pay the purchase-money and interest; that he was a mortgagor in possession, but that upon redelivery of the cattle to A, B's right of compensation for the year's grazing became a personal right only, unaccompanied by any lien, possession, or right of control to give him property in the cattle; that his creditors could not levy an attachment upon them without becoming liable to A as a trespasser.[3]

Where the title to the property remains unqualifiedly in the bailor, the bailee has no attachable interest. For example: A contracted with B, the owner, to take a flock of sheep two years to pasture and shear them and deliver the wool to B who was to sell it and pay A one-half the proceeds, and A to redeliver the sheep to B at the end of the term, when he was to give A one-half the increase. It was held that A had no attachable interest in either the sheep or the increase.[4] A mechanic's or manufacturer's lien is said to be neither a *jus ad rem* or a *jus in re*, but a simple right personal to the party in whom it exists to retain the property, and that it is not assignable or attachable as personal property, or as a chose in action of the person entitled to it.[5]

1. Wheeler *v.* Train, 3 Pick.(Mass.) 255.

2. Walcot *v.* Pomeroy, 2 Pick. (Mass.) 121.

In which case both the officer and the attaching creditor is liable to the owner in trespass.

3. Megee *v.* Beirne, 39 Pa. St. 50.

4. Tuohy *v.* Wingfield, 52 Cal. 319.

5. Lovett *v.* Brown, 40 N. H. 511; Townsend *v.* Newell, 14 Pick. 332.

Where boards were furnished to a workman to make a desk at a fixed price for the job, the property and constructive possession were said to be in the employer, and the workman having no attachable interest, even though a part of the material was supplied by him. Stevens *v.* Briggs, 5 Pick. (Mass.) 177.

§ 42. (e) **Chattels held under pledge.**—The general rule is that chattels pledged are not liable to attachment as the property of the pledgor,[1] unless they remain in the possession of the pledgor.[2] Generally, the possession of the pledged property by the pledgee is necessary to the validity of the pledge; but this is a matter that is now largely controlled by special statutes to the contrary, as in the case of chattel mortgages.[3] The pledgee has the exclusive right to retain the property; and in one case it was said that he might recover the whole value thereof from the attaching officer, even though it was pledged for less than its real value.[4] It was long said to be doubtful whether the attaching creditor had a right to remove the encumbrance or not.[5] This is now specially allowed by the provision of the statutes in many states, but in no case can pawned or mortgaged property be attached without paying the amount for which it is held as security.[6] A pledgee of personal property is answerable in garnishment or trustee process only for the balance which remains in his hands after satisfying his legal and equitable claims, but his right to sell the pledge is not affected by the attachment suit.[7]

It seems that where the creditor himself is in possession of property which the debtor has pledged to secure his indebtedness, the creditor can not attach other property of the debtor in an action to recover the debt without first returning the pledge.[8] But the rule seems to be different where the creditor does not have the possession of the chattel, but holds merely collateral security.[9]

§ 43. (f) **Chattels under mortgage.**—The interest which a

1. Soule *v.* White, 14 Me. 436; Picquet *v.* Swan, 4 Masn. (U. S. C. C.) 443; Holbrook *v.* Baker, 5 Me. 309; Hill *v.* Simpson, 8 La. Ann. 45.

2. Salinas City Bank *v.* Graves, 79 Cal. 192.

3. See *post*, § 43.

4. Lyle *v.* Barker, 5 Binney (Pa.) 457.

5. Surgent *v.* Carr, 12 Me. 396; Badlam *v.* Tucker, 1 Pick. (Mass.) 389.

6. Blake *v.* Hatch, 25 Vt. 555.

7. Chapman *v.* Gale, 32 N. H. 141.

8. Cleverly *v.* Brackett, 8 Mass. 150. But compare Cornwall *v.* Gould, 4 Pick. (Mass.) 444; Morse *v.* Woods, 5. N. H. 300; Chapman *v.* Clough, 6 Vt. 123.

9. Deering & Co. *v.* Warren, 1 S. D. 35, 44 N. W. Rep. 1068.

mortgagor of chattels retains in the property mortgaged is the mere equitable right of redemption by paying the debt and such interest is not attachable,[1] unless made so by special statute.[2] in states where mortgaged personalty in possession of the mortgagor is not subject to attachment for his debts, a tender of the mortgage debt after levy will not cure the illegality.[3]

It is, however, true that whenever a statute permits an attachment of property which is subject to a chattel mortgage, the right of attachment must necessarily follow the right of possession of the mortgaged property, because the attaching creditor can acquire no greater right in the property than his debtor had.[4] The interest of a mortgagor of personal property is only subject to attachment when he has a definite and determined right of possession. Possession during the pleasure of the mortgagee is not sufficient.[5] When the mortgagor's interest is attachable before default, it is only so when he is to retain possession.[6] Except where, notwithstanding the mortgage provides that the mortgagor may retain possession, he surrenders possession to the mortgagee.[7] The interest of

1. Haven *v.* Low, 2 N. H. 13; Cutler *v.* James Goold Co., 43 Hun (N. Y.) 516; Sawyer *v.* Mason, 19 Me. 49; Paul *v.* Hayford, 22 Me. 234; Libby *v.* Cushman, 29 Me. 429; Barrows *v.* Turner, 50 Me. 127; Anderson *v.* Doak, 10 Iredell (N. C.) 295; Peckinbaugh *v.* Quillin, 12 Neb. 586; Williams *v.* Whoples, 1 Head (Tenn.) 401.

2. For a construction of the Massachusetts statutes providing various modes in which this may be done, see Porter *v.* Warren, 119 Mass. 535. See also Haskell *v.* Gordon, 3 Metc. (Mass.) 268, and Johnson *v.* Sumner, 1 Metc. (Mass.) 172.

3. Jennings *v.* McIlroy, 42 Ark. 236; s. c. 48 Am. Rep. 61; Simonds *v.* Pearce, 31 Fed. Rep. 137; Bank *v.* Gourdin, Speers, (S. C.) Ch. 439.

4. See *ante*, § 40.

5. Merchants' Nat. Bank *v.* Abernathy, 32 Mo. App. 211; Sams *v.* Armstrong, 8 Mo. App. 573.

As to the effect of the lien obtained by the mortgagee of chattel property and the manner in which seizure thereof should be made, see *post*, § 212; King *v.* Hubbell, 42 Mich. 597.

6. Blauvelt *v.* Fechtman, 48 N. J. L. 430, 8 Atl. Rep. 728; Fairbanks *v.* Bloomfield, 5 Duer (N. Y.) 434; Livor *v.* Orser, 5 Duer (N. Y.) 501; Hall *v.* Samson, 23 How. (N. Y.) Pr. 84.

There is no difference in this respect whether the mortgage is payable at a future day or payable on demand. Livor *v.* Orser, 5 Duer (N. Y.) 501.

7. Powers *v.* Elias, 53 N. Y. Supr. Ct. 480.

the mortgagor in chattel property mortgaged when he is in possession, after condition broken, may also in some states be attached.[1] But the detention of the mortgaged chattel by an attaching creditor is a conversion of the same for which an action will lie at suit of the mortgagee.[2] Where the mortgagee has the title and the right of possession, and the property is attached by a creditor of the mortgagor, such attaching creditor becomes liable as a trespasser.[3]

The mortgagor's interest in whatever proceeds may remain in the hands of an officer after mortgaged chattels have been sold and the mortgagee paid, is subject to a garnishee process served upon the officer in a suit brought against the mortgagor.[4]

Whenever a statute permits an attachment of the mortgagor's interest in mortgaged chattels, the payment or tender of payment of the mortgagee of the amount of his demand is a condition precedent thereto. And if one attachment is discharged because of a failure to perform this condition, a second attachment which has complied with the condition is valid against the mortgagor.[5]

The rule of law prohibiting the attachment of mortgaged chattels at suit of the mortgagor contemplates the protection of the mortgagee. Therefore, the attachment of mortgaged chattels by a creditor of the mortgagor is not void in itself, but at most is merely voidable at the election of the party having the lien, and if he waive his lien or confirm the attachment it is valid as to everybody.[6]

1. Carty *v.* Fenstemaker, 14 Ohio St. 457.

In Rhode Island it may be attached after the condition of the mortgage has been broken for sixty days. Earle *v.* Anthony, 1 R. I. 307. In Vermont it may not be attached after condition broken. Norris *v.* Sowles, 57 Vt. 360.

2. Fairbanks *v.* Bloomfield, 5 Duer (N. Y.) 434; Livor *v.* Orser, 5 Duer (N. Y.) 501.

The mortgagee who demands the property from the attaching creditor, after default, is under no obligation to pay or tender the costs. Livor *v.* Orser, 5 Duer (N. Y.) 501.

3. Moore *v.* Murdock, 26 Cal. 514. See "Liability of Plaintiff," *post*, § 357.

4. Hoffman *v.* Wetherell, 42 Ia. 89.

5. Wheeler *v.* Bacon, 4 Gray (Mass.) 550; Howe *v.* Tefft, 15 R. I. 477, 8 Atl. Rep. 707.

6. Clement *v.* Little, 42 N. H. 563; Hill *v.* Wiggin, 31 N. H. (11 Fost.) 292.

Where a creditor himself holds a mortgage upon chattels of his debtor it seems that he may, if he choose, waive his lien under the mortgage and sue out an attachment against the same property.[1] The interest of a mortgagee is not attachable when the chattel is still in the possession of the mortgagor without default.[2] Nor can it be made so by joining the mortgagor and the mortgagee as defendants in an action on the joint debt.[3]

§ 44. **Chattels held by an assignee.**[4]—It is the general rule that property held by an assignee under a valid assignment for the benefit of creditors is not subject to attachment or garnishment for the assignor's debts.[5]

Furthermore, the money obtained from an assignee's sale of the property of the debtor, belongs to the assignee for the benefit of all the creditors and can not be attached by one of them.[6] And, though an attachment be maintained on the ground that the assignment was fraudulent, it will not cover money then collected by the assignee's attorney from claims due the assignor.[7] Nor can the proceeds of a sale of property, transferred by an alleged fraudulent assignment for the benefit of creditors, be attached or levied upon as the debtor's property.[8]

1. Whitney *v.* Farrar, 51 Me. 418; William Deering & Co. *v.* Warren, 1 S. D. 35, 44 N. W. Rep. 1068.

2. Morton *v.* Hodgdon, 32 Me. 127,

3. Murphy *v.* Galloupe, 143 Mass. 123.

4. See also *post*, § 46, "Property in Custody of Law."

5. Schueter *v.* Raymond, 7 Neb. 281; Lord *v.* Meacham, 32 Minn. 66.

Even a statute providing that personal property shall, in all cases, be subject to execution on a judgment obtained for the purchase-price unless found in the hands of a purchaser, does not make personal property attachable which is in possession of the debtor's assignee for the benefit of creditors, when the assignment is valid so far as the attaching creditor is concerned. Rev. St. Mo., § 2353; Boltz *v.* Eagon, 34 Fed. Rep. 521.

It has been held in Minnesota that property in the assignee's possession, under a state insolvency law is not in *custodia legis*, so as to exempt it from an attachment from the United States circuit court. Lapp *v.* Van Norman, 19 Fed. Rep. 406.

6. McAllister *v.* Bailey, 1 N. Y. S. 12; Hallowell *v.* Bayliss, 10 Ohio St. 536.

7. *Re* Foley, 10 Daly (N. Y.) 4.

8. Lawrence *v.* Bank of Republic, 35 N. Y. 320.

It seems that the only remedy of the reditor in such a case is to institute a creditor's suit to fasten a trust

A voidable assignment for the benefit of creditors, however, does not prevent an attachment of the assigned property by creditors not parties to such assignment.[1]

It seems, nevertheless, that an assignment of property for the benefit of creditors by virtue of a statute of another government, or sister sovereignty, does not affect a transfer of the bankrupt's title so as to cut off the liens of attaching creditors in a state other than the one under the laws of which the assignment was made.[2]

Property assigned for the payment of debts may be attached by a dissenting creditor and be effective as to the surplus after the satisfaction of the demands of the creditors who have not dissented.[3] And when any property is assigned as security for a debt, any residue remaining in the hands of the assignee after the debt is satisfied may be attached, because such an assignment leaves the assignor the owner of the residue.[4] Even a verbal assignment made in good faith, and for a valuable and adequate consideration, will transfer an interest in an account so as to be effective against a subsequent proceeding in garnishment.[5]

§ 45. **Chattels held by a trustee.**—When property is conveyed by a debtor to a trustee in an express trust—as that it be sold for the payment of certain debts—the property so conveyed is not subject to attachment against the debtor until the

upon such proceeds for the benefit of creditors and restrain the assignee from disposing of them. Lawrence *v.* Bank of Republic, 35 N. Y. 320.

1. Stevens *v.* Bell, 6 Mass. 339, 342.

By trustee process; Wyles *v.* Beals, 1 Gray (Mass.) 233; Edwards *v.* Mitchell, 1 Gray (Mass.) 239. See also *post*, Vol. II, "Garnishment."

2. Willetts *v.* Waite, 13 How. (N. Y.) Pr. 34.

3. Tood *v.* Bucknam, 11 Me. (2 Fairf.) 41.

4. Fithian *v.* N. Y., etc., R. R. Co., 31 Pa. St. 114.

Where a valid assignment has been made garnishment will not be effective against the debtor, and the assignee may intervene and assert his rights against the attachment plaintiff. Easley *v.* Gibbs, 29 Ia. 129.

5. Simpson *v.* Bibber, 59 Me. 196. See also "Garnishment," *post*, Vol. II.

A garnishee in an action brought against S. M. R. answered that he had funds of L. J. R. It was held that his liability was not affected by assignment made by the defendant after the service of the writ and before an amendment changing the action to one against "S. M. R., otherwise called L. J. R." Vermilyea *v.* Roberts, 103 Mass. 410.

conditions of the trust are fully performed.[1] But any surplus remaining in the hands of the trustee after the performance of conditions may be the subject of an attachment.[2] The trust, however, must be one that is just and equitable in its nature, or the property so transferred will still be liable in attachment. Property conveyed "in trust for the use and benefit of the said (debtor) and his immediate family, free from liability for any of his debts, contracts or engagements" was not thereby protected from attachment.[3] Where there is fraud in the transfer, the property in the hands of the trustee is attachable.[4]

The mere agreement to turn property over to a trustee for certain purposes is not effective as against attaching creditors. The property must be actually surrendered pursuant to such an agreement.[5]

The trustee's interest in the property held by him in his own name in trust is not attachable at suit of his creditors unless they are *bona fide* creditors without notice of the trust.[6] The property bought with borrowed money, and held in secret trust, is attachable as the purchaser's property, notwithstanding the secret conditions of the trust.[7]

1. Anderson *v.* Doak, 10 Ired. (N. C.) 295.

2. McLaughlin *v.* Swann, 18 How. 217; Hearn *v.* Crutcher, 4 Yerg. (Tenn.) 461; Thompson *v.* Ford. 7 Ired. (N. C.) L. 418.

The trustee of an express trust may be required to account for the funds in his hands under a garnishment process. McDonald *v.* Moore, 34 Tex. 384. And in many states this is the better, if not the only proceeding.

A bill of sale providing that part of the purchase-money should be paid to certain creditors of the vendor does not create a trust, unless the vendee agreed to make such payment. Therefore the unpaid balance on the bill of sale remains due to the vendor and may be attached by his creditors. Kelly *v.* Babcock, 49 N. Y. 318.

3. Warner *v.* Rice, 66 Md. 436.

But where a deed of trust is inoperative it will not entitle a creditor to recover of the trustee funds which he has received for property exchanged for that conveyed, where there has been no fraud on the part of the original debtor. Sibley *v.* Johnson, 43 Vt. 67.

4. Horwitz *v.* Ellinger, 31 Md. 492.

5. Lynch *v.* Crary, 34 N. Y. Supr. Ct. 461.

6. Porter *v.* Bank of Rutland, 19 Vt. 410; Glidden & Joy Varnish Co. *v.* Joy, 8 Ohio Cir. Ct. Rep. 157.

7. Huntington *v.* Clemence, 103 Mass. 482.

It is a general rule in equity that land held in trust is not attachable for the debt of a trustee, even though the title stands of record in his name, and the creditor have no notice of the trust; and that if such an action be begun at law it will be enjoined. Houghton *v.* Davenport, 74 Me. 590.

The interest of the *cestui que trust* is not attachable, because it is only a surplus in the hands of the trustee that is attachable, and there can be no surplus belonging to the *cestui que trust*.[1]

§ 46. Chattels in the custody of the law.—Personal property *in custodia legis* is not subject to direct attachment. This rule is universal. What in some cases seems at first to be an exception is only the attachment of the then inseparable remainder after the law is fulfilled. This rule has been adopted for the protection of the officer, and to avoid collision of authority and conflict of title.[2] The rule is the same whether the property is in custody of the law under a prior attachment;[3] whether it has been taken on execution sued out on a judgment rendered in another form of action, and still in possession of the officer;[4] whether it has been paid by him into the court,[5] or whether it has been voluntarily placed in the custody of the court. And this is true, even though the money may have been subsequently deposited in a bank to the credit of the cause then pending.[6]

Money in the hands of an officer can not be reached, because it does not become the property of the defendant until it is paid over to him.[7] Neither is it a debt due to the plaintiff in the pending suit, rendering the officer liable as a garnishee in attachment.[8] But a balance of money in the hands of a sheriff

1. Clark *v.* Ward, 12 Gratt. (Va.) 440.

2. Davidson *v.* Kuhn, 1 Disney (Ohio) 405.

3. Powell *v.* Rankin, 80 Ala. 316; Kendrick *v.* B. and N. Y., etc., Railway Co., 3 R. I. 235.

The sheriff acquires a special property therein and is responsible for the safe custody and return. Lathrop *v.* Blake, 23 N. H. 46.

4. Hardy *v.* Tilton, 68 Me. 195; Reddick *v.* Smith, 4 Ill. 451; Conant *v.* Bicknell, 1 D. Chipman 50; Blair *v.* Cantey, 2 Speers 34; Prentiss *v.* Bliss, 4 Vt. 513; Dubois *v.* Dubois, 6 Cowen (N. Y.) 494.

5. Farmers' Bank *v.* Beaston, 7 Gill & J. (Md.) 421; Alston *v.* Clay, 2 Haywood (N. C.) 171.

6. Mattingly *v.* Grimes, 48 Md. 102.

This has reference to money in specie. As to garnishment see *post*, Vol. II.

7. Turner *v.* Fendall, 1 Cranch (U. S.) 117; First *v.* Miller, 4 Bibb (7 Ky.) 311; Crane *v.* Freese, 16 N. J. L. 305; Thompson *v.* Brown, 17 Pick. (Mass.) 462; Dawson *v.* Holcomb, 1 Ohio 275.

8. Clymer *v.* Willis, 3 Cal. 363. See as to "garnishment" *post*, Vol. II.

held, not in his official character, but in his private character, is attachable.[1] And money in the hands of a clerk of the court in his official character is not subject to attachment, but if it be held by him in his private character, it is not exempt from seizure thereunder.[2]

Property attached is considered in custody of the law until after it is disposed of under final judgment and can not be again attached by another officer.[3] Therefore if the property has been taken on a former attachment and surrendered to the defendant on his having given a bond therefor, it is still deemed to be within the custody of the law and not subject to attachment.[4] He must be permitted to keep possession and control of the property in order that he may be able to fulfill the conditions of his bond.[5]

Money or property in the hands of a United States marshal under a process of a federal court can not be seized by a sheriff with the writ issuing from a state court.[6] The levy under one process withdraws the property from the reach of the other

1. Orr *v.* McBride, 2 Carolina L. Rep. 257.

2. Hunt *v.* Stevens, 3 Ired. Law (N. C.) 365.

There are a few cases, however, which hold that the surplus money of property in the hands of the officer belongs to the defendant and is not in the custody of the law. Tucker *v.* Atkinson, 1 Humph. (20 Tenn.) 300; Benson *v.* Berry, 55 Barb. (N.Y.) 620. One maintaining that the surplus money in the hands of the officer, being the proceeds of a sale of land, is to be considered the land of the defendant and subject to attachment. Davison *v.* Clayland, 1 Harris & J. (Md.) 546. As to surplus in land see *post*, § 52, and Oldham *v.* Schrivener, 3 B. Mon. (Ky.) 579.

3. Metzner *v.* Graham, 57 Mo. 404.

As to attachment by same officer under a later writ see *post*, § —.

4. Hagan *v.* Lucas, 10 Peters (U. S.) 400; McKinney *v.* Purcell, 28 Kan. 446; Eidson *v.* Woolery, 10 Wash. 225, 38 Pac. Rep. 1025.

But the contrary is the rule in Vermont, where property has been attached, receipted for and left in defendant's possession, it is liable to attachment by another officer on another writ. Pond *v.* Baker, 58 Vt. 293. See further *post* "Property in Possession of a Receiptor."

5. Roberts *v.* Dunn, 71 Ill. 46.

If property be attached in the custody of the law, a purchaser, under an execution sale, acquires no title and will be compelled, by the court, to surrender the property. He is a purchaser *pendente lite*. Hackley *v.* Swigert, 5 B. Mon. (Ky.) 86; Kane *v.* Pilcher, 7 B. Mon. (Ky.) 651.

6. Likewise property held by a sheriff under attachment from a state court is not liable to be seized under process from an admiralty court of the United States. The Ship Orpheus, 3 Ware (U. S. Dist. Court, Me.) 143.

process and there is no superiority of jurisdiction in either court. The officer first making the seizure has priority without regard to the date of the writ. Furthermore the marshal and sheriff can not make a partnership levy.[1] Property in possession of a United States officer awaiting the payment of custom-house duties is in custody of the law and can not be seized by a state officer in execution of a writ of attachment.[2]

While it is true that property can not be twice seized[3] and that property in the hands of a sheriff of one court can not be ordered to be brought into another court[4] yet the sheriff may receive successive writs from the same court and hold the property subject to each of them successively.[5] An attempted seizure by another officer will create no lien,[6] even though the officer make an agreement concerning its possession,[7] and leave enough property in the hands of the first attaching officer to satisfy the lien of his attachment.[8] Two attachments can not be made by two different officers even though they be deputies of the same sheriff.[9] And should one attempt to make a seizure while the property is in the custody of the other, an action will lie against the sheriff for the trespass.[10] But property in the hands of a deputy sheriff may be attached by the sheriff, for

1. Burrell *v.* Letson, Strob. (S. C.) 239; Hagan *v.* Lucas, 10 Peters (U. S.) 400; Adler *v.* Roth, 2 McCrary 445, 5 Fed. Rep. 895; Moore *v.* Withenburg, 13 La. Ann. 22; Taylor *v.* Carryl, 24 Pa. St. 259, 20 How. Sup. Ct. (U. S.) 583; Freeman *v.* Howe, 24 How. Sup. Ct. (U. S.) 450; Lewis *v.* Buck, 7 Minn. 104; Smith *v.* Bauer, 9 Colo. 380.

But it seems a federal court may grant permission to proceed in a state court, by replevin, against the marshal who executed the writ when the title to the property is questioned. Weil *v.* Smith, 11 Colo. 310.

2. Harris *v.* Dennie, 3 Peters (U. S.) 292.

3. Thompson *v.* Marsh, 14 Mass. 269.

4. Jones *v.* Jones, 1 Bland (Md. Ch.) 443.

5. Watson *v.* Todd, 5 Mass. 271; Odiorne *v.* Colley, 2 N. H. 66; Bailey *v.* Childs, 46 Ohio St. 557. See also Adams *v.* Lane, 38 Vt. 640.

6. Beers *v.* Place, 36 Conn. 578; Bradley *v.* Kesee, 5 Cold. (Tenn.) 223.

7. Burroughs *v.* Wright, 19 Vt. 510.

8. Burroughs *v.* Wright, 16 Vt. 619; West River Bank *v.* Gorham, 38 Vt. 649; Walker *v.* Foxcroft, 2 Me. 270; Vinton *v.* Bradford, 13 Mass. 114.

9. Strout *v.* Bradbury, 5 Me. 313; Vinton *v.* Bradford, 13 Mass. 114; Moore *v.* Graves, 3 N. H. 408.

10. Robinson *v.* Ensign, 6 Gray 300; Thompson *v.* Marsh, 14 Mass. 269.

since a deputy is a servant of the sheriff the possession of the former is the possession of the latter.[1] Property in the hands of an executor or administrator or of a guardian or conservator or of any such personal representative, is in *custodia legis* and can not be attached.[2]

Property in the hands of a receiver or trustee duly appointed by a competent court is in custody of the law and can not be attached.[3]

Property in the hands of a master in chancery, in a proceeding where an order has been entered that such property be deposited with the master until the further order of the court, is in custody of the law and can not be attached.[4]

Property in the hands of a garnishee is, in some states, said to be in custody of the law and not subject to attachment.[5] But in other states goods in the hands of a garnishee may be attached, but the attaching officer must hold subject to the lien of the creditor, who previously summoned the garnishee,[6] because the plaintiff in the garnishment acquired a lien prior to the plaintiff in a subsequent attachment.[7]

The right of an attachment plaintiff to follow the attached property into the hands of third persons, who have acquired rights from the owner after the attachment, is a matter that has been the subject of much litigation and the whole matter seems to depend upon the reality of the sheriff's possession under the attachment. The possession of a keeper or custodian

1. Watson *v.* Todd, 5 Mass. 271.

2. See *post*, § 83.

3. County of Yuba *v.* Adams, 7 Cal. 35; Perego *v.* Bonesteel, 5 Bissell (U.S.) 66; Whihelm *v.* Miley, 5 Serg. & R. (Pa.) 137; M'Cready *v.* Guardians, 9 Serg. & R. (Pa.) 94; Skinner *v.* Stuart, 39 Barb. (N. Y.) 206; Whitmarsh *v.* Campbell, 2 Paige (N. Y.) 67.

In Dakota it is held that the property of an insolvent debtor, in the hands of one seeking to become a preferred creditor by mortgage, in a suit against the debtor, action will lie against the attaching officer by the one in possession, for conversion of mortgaged property. Straw *v.* Jenks, 6 Dak. 414, 43 N. W. Rep. 941; Citizens' Nat. Bank *v.* Jenks, 6 Dak. 432.

4. Kenzie *v.* Noble, 13 Rich. Law (S. C.) 147.

5. Northfield, etc., Co. *v.* Shapleigh, 2 Neb. 635; Scholefield *v.* Bradlee, 8 Martin (La.) 495; Dennistoun *v.* N. Y. C. Co., 6 La. Ann. 782; Brashear *v.* West, 7 Peters (U. S.) 608.

6. Burlingame *v.* Bell, 16 Mass. 318.

7. Sweet *v.* Brown, 5 Pick. (Mass.) 178.

is the possession of the sheriff himself; unless the plaintiff in the attachment is himself the keeper and suffers the property attached to be taken out of his possession and sold without any steps having been taken to regain the possession, in which case he can not disturb the title of the purchaser.[1] The property is in custody of the law so long as the officer holds as such, even though the creditor and debtor may have adjusted their matters, if the attachment has not in fact been dismissed.[2]

Goods seized by the sheriff as the property of a named defendant in one writ may subsequently be attached by the same officer on another writ as the property of another person named as defendant, who is the actual owner, in a suit by the same plaintiff.[3]

§ 47. **Chattels owned by a copartnership—(a) Generally.**[4]— In contemplating the attachment of personal property owned by a copartnership, two questions incidentally arise: Is the demand sought to be enforced a demand against an individual partner, or is it an indebtedness of the copartnership? In other words, is the purpose of the attachment to enforce the payment of an individual debt, or of a firm debt? Then the further question arises: Has the ground or condition on which the law permits an attachment to be made arisen against every member of the firm, or against one member only? These questions will be taken into consideration separately. If the demand is against the firm as a whole, and the grounds for attachment exist as to every member thereof, the proceedings in attachment against the firm will, of course, be similar to proceedings in attachment against an individual who is not a member of a copartnership on his sole indebtedness.[5]

§ 48. **(b) For the firm debt, when the grounds for attachment have not arisen as to all the members.**—The different

1. Whann *v.* Hufty, 12 La. Ann. 280; *post*, "Possession of Attached Property."

2. Dixon *v.* Barnett, 29 Pac. Rep. 209, 3 Wash. St. 645.

3. Livingston *v.* Smith, 5 Peters (U. S.) 90.

4. See, also, *post* "Tenants in Common," § 82.

5. *Post*, § 81.

states seem to take one of three different views regarding the bringing of attachment against the partnership property when the grounds therefor do not exist as against all the members thereof—as, for example, where one member of a partnership is an absent or absconding debtor, and the other member or members continue to reside in the state and carry on the copartnership business. The first class holds that when a ground for attachment is given by one member only of the copartnership, no attachment can be made upon the copartnership property for the firm debt. The second class holds that the attachment may be brought, but only as against the interests of the individual giving grounds therefor, and on the partnership debt. The third class holds that when a ground for an attachment is given by one member of the copartnership, an attachment may issue against the entire copartnership, and the property of the firm seized. These will be given in their order.

The first class holds that the fact that one of two partners has been guilty of fraudulent acts, and has thereafter absconded, will not authorize the attachment of all the property of the firm when the other partner remains in the state and is not guilty of the fraud.[1] When one is a non-resident of the state and the other is a resident, attachment will not lie against both.[2] It can not issue against the firm unless all the members have absconded or kept concealed, or given other grounds on which an attachment may issue,[3] unless the firm is insolvent,[4] or unless it be alleged and shown that the other obligors have no property subject to execution sufficient to pay the demand, and that it would be endangered by delay.[5] If the affidavit in attachment is good as to one only, the writ can not

1. Bogart *v.* Dart, 25 Hun (N. Y.) 395.

2. Taylor *v.* McDonald, 4 Ohio 149; Wallace *v.* Galloway, 5 Coldw. (45 Tenn.) 510; Barber *v.* Robeson, 15 N. J. L. (3 Green) 17.

3. Leach *v.* Cook, 10 Vt. 239; Williams *v.* Muthersbaugh, 29 Kan. 730; Worthley *v.* Goodbar, 53 Ark. 1, 13 S. W. Rep. 216.

4. Ogilvie *v.* Washburn, 4 Greene (Iowa) 548; Courrier *v.* Cleghorn, 3 Greene (Iowa) 523.

5. Dunn's Trustee *v.* McAlpin, 90 Ky. 78, 13 S. W. Rep. 363.

issue against all.[1] It will be well, however, to remember that while the residence of a member may be sufficient to defeat the attachment in such cases, when raised by a plea in abatement, yet it must be pleaded in apt time. The objection comes too late after appearance and entry upon the trial on the merits.[2] Maryland states emphatically that in a suit against a firm, where process is served on one of the partners, the partnership assets can not be seized and condemned by a proceeding in attachment against another partner who has absconded.[3] Louisiana, while making a modification of this rule by requiring that the place of business of the firm is out of the state,[4] holds that the residence of one member of the firm gives a jurisdiction to partnership matters, and states further, that while the proposition is correct that the property of one can not be attached to pay the debt of another, yet "the attachment in this state of the interest of a non-resident in the property of a foreign commercial firm, for a debt due a citizen of this state, is not forbidden by any law or opposed by any consideration of public policy, but, on the contrary, is recommended as a matter of remedial justice in favor of our citizens."[5] In North Carolina it has been held that if the only resident member of a firm give notice that he is about to leave the state, and is ready to answer any suit that may be brought against him, the property of the firm can not, after his departure, be attached for a partnership debt due before the notice.[6]

The second class holds that where one member of a firm resides out of the state or absconds or gives other ground for at-

1. Hamilton *v.* Knight, 1 Blackf. (Ind.) 25.

But where both reside out of the state the affidavit need not recite that the contract is joint. Dobbs *v.* The Justices, 17 Ga. 624. See also *post*, § 127 *et seq*, "Affidavit."

2. Voorhees *v.* Hoagland, 6 Blackf. (Ind.) 232.

3. Johnston *v.* Mathews, 32 Md. 363.

By virtue of the code the residence of two partners, within the jurisdiction of a court, is sufficient, in a suit, against the firm, and the writ shall issue against the property of such as are so brought within the provisions of the law, the summons to issue against all the joint defendants. Collier *v.* Hanna, 17 Atl. Rep. 390, 71 Md. 253.

4. Shirley *v.* Bride, 5 La. Ann. 260; Barriere *v.* McBean, 12 La. Ann. 493.

5. Taylor *v.* Kehlor, 28 La. Ann. 530.

6. Robinson *v.* Crowder, 1 Bailey (S. C.) 185.

tachment, his interest only in the firm assets may be attached,[1] upon a debt due by the partnership.[2] The sheriff can, however, sell only his undivided moiety in the property of the firm.[3] He can not take the partnership effects, because the remaining partner has the right to retain the possession of the partnership property or have it applied to the payment of the partnership debts.[4] The separate property of him alone who gives ground for attachment is liable thereto.[5] If a partnership consists of two members, and only one of them is a nonresident, a firm creditor by attachment of the firm property, can gain no priority over other firm creditors, except as to the nonresident partner's individual interest.[6] The issuance of an attachment of the property of one member of the firm only, on a firm debt holds only the interest of such partner, after the payment of all the partnership debts,[7] and if the firm is in fact insolvent, it holds nothing.[8]

The third class of cases holds that the absence from the state (or other cause of attachment) of one copartner authorizes an attachment against him and his copartners, to subject the partnership property to the payment of copartnership debts.[9] In South Carolina, a partnership debt is a joint debt, and the code provides that where one joint debtor is served, judgment may be entered against all the defendants jointly indebted, and may be

1. McHenry *v.* Cawthorn, 4 Heisk. (Tenn.) 508; Buckingham *v.* Swezey, 25 Hun (N. Y.) 84; Conklin *v.* Harris, 5 Ala. 213; Green *v.* Pyne, 1 Ala. 235; Jefferson County *v.* Swain, 5 Kan. 376.

2. Chipman's Case, 14 Johns. (N. Y.) 217.

3. Mersereau *v.* Norton, 15 Johns. (N. Y.) 179.

4. Chipman's Case, 14 Johns. (N. Y.) 217; Smith's Case, 16 Johns. (N. Y.) 102; Robbins *v.* Cooper, 6 Johns. (N. Y.) Ch. 186; Taylor *v.* Kehlor, 28 La. Ann. 530; Austin *v.* Burgett, 10 Iowa 302.

The effects of an American consul, residing abroad, and who was engaged in partnership with another defendant, are not to be protected from a foreign attachment. Caldwell *v.* Barclay, 1 Dall. 305, note.

5. White & Schnebly's Case, 10 Watts (Pa.) 217.

6. Andrews *v.* Mundy, 36 W. Va. 22, 14 S. E. Rep. 414.

7. 4 Robt. 106.

8. Doane *v* Lindsay, 42 N. Y. Sup. Ct. 399.

9. Jefferson County *v.* Swain, 5 Kan. 376; Conklin *v.* Harris, 5 Ala. 213; Randall *v.* Johnson, 13 R. I. 338; Wilcox *v.* Carey, 9 Dana (Ky.) 297; Moore *v.* Simpson, 5 Litt. (Ky.) 49; Watts *v.* Griffin (Ky.), Litt. Sel. Cas. 244; Miles *v.* Brown, 59 Ky. 404; Duncan *v.* Headley, 67 Ky. 45.

enforced out of the joint property of all.[1] And in New York a like rule obtains, and without notice or publication as to the one not served joint property so attached may be sold on execution, if plaintiff obtains judgment on the joint liability.[2]

§ 49. (c) **For the individual debt of a copartner.**—The interest of a member of a copartnership in the firm assets is the share to which he is entitled under the copartnership agreement after all the partnership debts are paid, and if the assets be insufficient the individual interest will be nothing.[3] This is the universal holding of all the states, but thereunder one class holds that the partnership property can be seized under execution against one member for his individual debt and sold; but that the interest which passes is only the interest of the debtor in the residuum of the partnership property after settlement of the partnership debts;[4] that is to say, the interest sold under the execution issued on the judgment obtained on the attachment will be subject to the prior rights and liens of other partners and joint creditors therein.[5] But no specific asset, credit, or personal property of the partnership can be seized on execution or attachment against one of the copartners.[6] And if such levy be made it will be a trespass.[7] There is no difference between a levy in attachment and a levy of execution in this respect, for whatever property a sheriff may take on execution he may seize and take on attachment also. He must there-

1. Whitfield *v.* Hovey, 8 S. E. Rep. 840, 30 S. C. 117.

2. Yerkes *v.* McFadden, 36 N. E. Rep. 7, 141 N. Y. 136.

3. Staats *v.* Bristow, 73 N. Y. 264; Newman *v.* Bean, 21 N. H. 93; United States *v.* Williams, 4 McLean (U. S.) 236; Thomas *v.* Winchester Bank, (Ky.) 31 S. W. Rep. 732.

4. Robinson *v.* Tevis, 38 Cal. 611.

5. Jones *v.* Thompson, 12 Cal. 191, 199; Barber *v.* Hartford Bank, 9 Conn. 407; S. P. Church *v.* Knox, 2 Conn. 514; Burgess *v.* Atkins, 5 Blackf. (Ind.) 337; Douglas *v.* Winslow, 20 Me. 89; Smith's Case, 16 Johns. (N. Y.) 102.

The levy will be subject to all the partnership accounts; and in that respect debts and other choses in action will not be distinguished from tangible personal property of the firm. Day *v.* McQuillan, 13 Minn. 205. See also "Garnishment," *post*, Vol. II.

6. Levy *v.* Cowan, 27 La. Ann. 556; Alexander *v.* Burns, 6 La. Ann. 704; Hutchinson *v.* Dubois, 45 Mich. 143.

7. Sirrine *v.* Briggs, 31 Mich. 443; Haynes *v.* Knowles, 36 Mich. 407; Sanborn *v.* Royce, 132 Mass. 594; Cropper *v.* Coburn, 2 Curtis (U. S.) 465.

fore, in making an attachment, levy upon the interest of one of the several copartners for his individual debt, seize and take possession of the entire leviable property of the copartnership.[1] But such taking of possession of the whole by the officer is merely incidental and should be in harmony with, and not in hostility to, the rights of the other partner so far as the same is possible.[2]

It is both the privilege and the duty of the sheriff to seize the whole of the partnership goods, but he can only sell the undivided moiety or share of the individual partner therein, against whom the attachment is sustained. And if he deems it advisable, to prevent their being wasted or carried away, he has the right to take the goods into his actual custody and possession, and another partner can not maintain an action of replevin therefor.[3] If the sheriff sells the entire property it is a conversion and he is liable in trover or trespass for the other share.[4] The sale by the sheriff does not divest the joint owner of his title.[5] But the sheriff is not liable in damages to the other party when he sells only the part belonging to the individual debtor.[6] The purchaser becomes a tenant in common with the other partner, subject to the right of such other, and through him the partnership creditors may have the property applied to the payment of the joint debts.[7] This may subject him to an accounting among the partners,[8] and it seems that the right obtained by purchase at a sheriff's sale of such undivided moiety must be enforced in a court of equity. The sheriff must for the time being, in order to make the sale, have the

1. Smith *v.* Orser, 42 N. Y. 132; Marshall *v.* McGregor, 59 Barb. (N. Y.) 519.

2. Atkins *v.* Saxton, 77 N. Y. 195; Wier Plow Co. *v.* Armentrout, (Tex. Civ. App.) 28 S. W. Rep. 1045.

3. Davis *v.* White, 1 Houst. (Del.) 228; Remmington *v.* Cady, 10 Conn. 44; Lawrence *v.* Burnham, 4 Nev. 361; Reed *v.* Howard, 2 Met. (Mass.) 36; Waldman *v.* Broder, 10 Cal. 378; Choppin *v.* Wilson, 27 La. Ann. 444; Levy *v.* Cowan, 27 La. Ann. 556; Lee *v.* Bullard, 3 La. Ann. 463; Andrews *v.* Keith, 34 Ala. 722.

4. Ladd *v.* Hill, 4 Vt. 164; Bradley *v.* Arnold, 16 Vt. 382; White *v.* Morton, 22 Vt. 15; Melville *v.* Brown, 15 Mass. 82; Eldridge *v.* Lancy, 17 Pick. (34 Mass.) 352.

5. White *v.* Jones, 38 Ill. 159.

6. Clark *v.* Cushing, 52 Cal. 617.

7. Randall *v.* Johnson, 13 R. I. 338; Bernal *v.* Hovious, 17 Cal. 542.

8. Hergman *v.* Dettlebach, 11 How. (N. Y.) Pr. 46.

custody of the entire property.[1] But he can not make a partition of the property.[2] The sheriff may relieve himself from all liability, by delivery after sale to the original co-tenant.[3] The purchaser of a partner's interest in the partnership property is not entitled to take possession of any part of the property.[4]

While the attachment of partnership property, by a creditor of an individual member of the firm, will be good against all creditors whose demands are not upon the firm,[5] the creditors of the firm have a preference over the individual partner, and especially so where there are judgments entered in both cases.[6]

There is a small class of cases which holds that the goods of the partnership can not be seized on an execution or attachment for the individual debt of the partner. And that the creditor can have only the right of his debtor in the surplus after the partnership debts are paid, and that this does not entitle the creditor, nor the officer seizing his interest, to the exclusive possession of the partnership property.[7] Yet, nevertheless, this class still holds that the interest of one partner in the property of the company, though incapable of actual seizure and reduction to possession, is liable to an attachment and levy, and to sale upon execution. The peculiar nature of the interest, while being such as to allow the security to be im-

1. Newhall *v.* Buckingham, 14 Ill. 405; Reed *v.* Howard, 2 Metc. (Mass.) 36; Walker *v.* Fitts, 24 Pick. (Mass.) 191; Eldridge *v.* Lancy, 17 Pick. (Mass.) 352.

2. Veach *v.* Adams, 51 Cal. 609.

3. Frost *v.* Kellogg, 23 Vt. 308.

4. Darbarrow's Appeal, 84 Pa. St. 404; Bank *v.* Carrollton R. R., 11 Wall. (U. S.) 624-8-9.

If the partnership funds are reduced to money, the court will only order such sum to be paid over as belongs to the partners sued, and may, in its discretion, order security to be given for that moiety until a settlement is made between the partners. Chatzel *v.* Bolton, 3 McCord (S. C.) 33.

5. Phillips *v.* Bridge, 11 Mass. 249; Pierce *v.* Jackson, 6 Mass. 242.

6. Commercial Bank *v.* Mitchell, 58 Cal. 42-49; Pierce *v.* Jackson, 6 Mass. 242.

If in an attachment against one person, the entire property of a firm be seized as the sole property of the debtor, it can not be justified by proving that he has an interest in such property as a partner. Zoller *v.* Grant, 3 N. Y. S. 539, 56 N. Y. Super. Ct. 279.

7. Hill *v.* Wiggin, 31 N. H. 292; Gibson *v.* Stevens, 7 N. H. 352; Patterson *v.* Trumbull, 40 Ga. 104.

paired, yet constitutes no exemption.[1] Where the sheriff can not seize the goods of the firm, but can levy only upon the interest of the partner in the firm,[2] the attachment does not amount to a statutory assignment of the partner's interest in unsettled partnership accounts. The lien acquired is not a specific thing. It is only a result. A specific debt or demand may be liquidated and still have an independent existence susceptible of attachment, but the partner's interest in unsettled accounts is not attachable, nor can a bill in equity be maintained upon them. A bill is supplemental and not ancillary to the attachment.[3]

However, a valid lien against a debtor, who is a member of a partnership, may be acquired by attaching all his interest in the effects of the firm, and summoning the other members of the partnership as garnishees. And such lien may be preserved by giving notice to the parties concerned, and such other acts designed to give notoriety to the attachment as the nature of the property will admit, even though possession can not be taken and the property removed to the exclusion of the other partners.[4]

§ 50. (d) **Of partnership effects after insolvency or dissolution.**—Although a copartnership may have been dissolved, it still exists for the purpose of liquidation, and the partnership property is still liable to attachment to that end.[5] The different members of an insolvent firm are not each entitled to his individual exemption from the partnership property seized for a partnership debt.[6] But where one member of a firm has become the owner of the firm property by its dissolution before it is attached by a firm creditor, he may claim an exemption therein.[7] Partnership property may also be attached by a cred-

1. Dow *v.* Sayward, 14 N. H. 9.
2. Vandike *v.* Rosskam, 67 Pa. St. 330.
3. Alter *v.* Brooke, 9 Phil. (Pa.) 258; Knerr *v.* Hoffman, 65 Pa. St. 126.
4. Treadwell *v.* Brown, 43 N. H. 290. See further as to "Garnishment," *post*, Vol. II.
5. Lobdell *v.* Bushnell, 24 La. Ann. 295.
6. Richardson *v.* Adler, 46 Ark. 43.
7. State *v.* Thomas, 7 Mo. App. 205.

itor of an individual member after the dissolution of the partnership, and after a receiver has been appointed by a decree of a court in equity, in a sister state.[1]

When the firm is insolvent, the property of an individual partner may be attached.[2]

§ 51. (e) **Of effects in the hands of a surviving partner.**—A surviving member of a copartnership holds the late firm's property *jure proprio*. It is his duty to settle up the partnership affairs and thereafter to account to the representative of the deceased partner. So long as the partnership affairs are unsettled, the partnership is considered to have a limited existence for the purpose of closing up the business, and an attachment may be resorted to, to enforce that end. The surviving partner is considered to be the owner of the partnership effects for that purpose, and the execution may be brought against him as surviving partner.[3]

§ 52. **What real property or interest therein—Generally.**—The rule regarding the attachment of real property is the same as that relating to the attachment of personal property. Whatever may be taken on execution may be taken on attachment. There are few exceptions to the rule that where the debtor holds a legal title to real estate, such real estate may be the subject of a levy in attachment.[4] But when the debtor holds merely

1. Schatzill *v.* Bolton, 2 McCord (S. C.) 478.

2. Buckingham *v.* Swezey, 25 Hun (N. Y.) 84.

3. Krueger *v.* Spieth (20 Pac. Rep. 664), 8 Mont. 482; Cobb *v.* Spieth (20 Pac. Rep. 806), 8 Mont. 494; Maxey *v.* Spieth (20 Pac. Rep. 806), 8 Mont. 494; Bozeman Nat. Bank *v.* Spieth, (20 Pac. Rep. 806), 8 Mont. 495; Ferguson *v.* Spieth (20 Pac. Rep. 807), 8 Mont. 493.

4. Isham *v.* Downer, 8 Conn. 282; Davidson *v.* Beatty, 3 Har. & J. (Md.) 594; Barney *v.* Patterson, 6 Har. & J. (Md.) 182; Hough *v.* Smoot, 2 Cranch C. Ct. 318; Graighle *v.* Notnagle, Pet. C. Ct. 249; Johnson *v.* Burnett, 12 Ala. 743; Wood *v.* Thomas, 2 Head (Tenn.) 160; Hackett *v.* Callender, 32 Vt. 97.

The interest of a miner in a mining claim may be taken in attachment. McKeon *v.* Bisbee, 9 Cal. 137; Halsey *v.* Martin, 22 Cal. 645.

Land can not be levied on by domestic attachment under the South Carolina act of 1785. It authorizes the attachment of such effects only as are capable of being removed. Jamieson *v.* Brodrick, 1 Brev. (S. C.) 396.

Pennsylvania act of 1879 "relative to fraudulent debtors" has been con-

an equitable title, or an equity of redemption, there is a contrariety of opinion in this regard, as will be subsequently shown.[1]

It is said in California that the term "land" embraces all titles, legal and equitable, perfect or imperfect, including such rights as lie in contract, those executory as well as those executed, and that any interest in land, legal or equitable, is therefore subject to attachment or execution.[2] And in New York any interest in land capable of being alienated is attachable.[3] But many of the other states do not make so broad an application of the term. It has been frequently held that the mere right of a widow to have her dower assigned to her is not such an interest in land as may be conveyed by her.[4] And that therefore it can not be attached,[5] until after it has been assigned.[6] A tenancy by the curtesy initiate is, for the same reason, not subject to attachment.[7] It seems, however, that where the land has been ordered to be appraised in proceedings in partition but which has not been accepted or sold at the date of the recovery of a judgment against a tenant by the curtesy initiate, he has an interest which may be attached.[8] In some states, by virtue of a special statute, any estate in lands or tenements of a duration longer than one year is deemed to be real estate, and if attached must be levied upon as such.[9]

strued not to provide for attachment of real estate. Continental Nat. Bank *v.* Draper, 89 Pa. St. 446.

1. See *post*, §§ 58–59.

2. Fish *v.* Fowlie, 58 Cal. 373.

3. Higgins *v.* McConnell, 130 N. Y. 482, 29 N. E. Rep. 978.

4. Ritchie *v.* Putnam, 13 Wend. (N. Y.) 524.

5. Nason *v.* Allen, 5 Greenl. (Me.) 479.

6. Waller *v.* Mardus, 29 Mo. 25.

A widow's release of dower is not a conveyance, but only an instrument which operates against her by estoppel. Frence *v.* Lord, 69 Me. 537.

7. Greenwich Nat. Bank *v.* Hall, 11 R. I. 124.

8. Lancaster County Bank *v.* Stauffer, 10 Pa. St. 398.

9. Mayhew *v.* Hathaway, 5 R. I. 283; Norris *v.* Watson, 22 N. H. (2 Fost.) 364.

That the interest of a tenant in crops and stock that are raised on shares is not attachable see Lewis *v.* Lyman, 22 Pick. (Mass.) 437; Miller *v.* Baker, 1 Metc. (Mass.) 27; Chandler *v.* Thurston, 10 Pick. (Mass.) 205. As to attachment of crops, see *ante*, § 32.

In Georgia land can not be levied upon and sold under an order of the magistrate in an attachment returnable to a justice's court. It must be taken by virtue of an execution issuing upon the judgment in attachment. Rogers *v.* McDill, 9 Ga. 506. And in Mississippi an attachment issuing for a sum not exceeding $50 can not be

Both real and personal property being liable to attachment, an attachment of real estate is valid, though the defendant has personal property sufficient to satisfy the demanded debt.[1]

Since real estate can not be taken into the possession of the officer making the attachment as personal estate may, some notoriety must be given to the act in order that the public may know that such a levy has been made. This will receive further attention under the subject of the service of the writ and the making of the levy.[2] But it may be well to state here that whatever act the statute prescribes in that regard, the performance thereof is the very essence of an attachment of real estate and must be performed with certainty.[3] The officer can not take possession of real estate and turn out the defendant or any other person, unless, possibly, when injury to the property itself is apprehended. Nor is such an act necessary to the validity of the levy.[4] When the officer has made such indorsement or memorandum as is by law required, he need make no vocal proclamation of the attachment.[5] The lien of the attachment dates from the time of the indorsement.[6]

Unlike the lien created by an attachment of personal property, the lien created by an attachment of real property is dissolved and wholly lost if the defendant die before judgment is rendered thereon,[7] even though the suit is revived and carried on to judgment against the heir.[8] The lien is created by the levy and fixed by the judgment. It is effective from the time of the levy, and is paramount to a judgment entered after the levy and before the judgment in attachment,[9] and is to be preferred to subsequent judgments and to purchasers and

levied on real estate. Plummer *v.* West, 41 Miss. 69.

1. Isham *v.* Downer, 8 Conn. 282. See "the Execution of the Writ," *post*, §§ 200, *et seq.*

2. See *post*, § 214.

3. Kittredge *v.* Bellows, 7 N. H. 399.

4. Wood *v.* Wier, 5 B. Mon. (Ky.) 544.

5. Rogers *v.* Bonner, 55 Barb. (N. Y.) 9.

6. Riordan *v.* Britton, 69 Tex. 198.

7. McClellan *v.* Lipscomb, 56 Ala. 255.

8. Phillips *v.* Ash, 63 Ala. 414.

9. Ensworth *v.* King, 50 Mo. 477; Harbin *v.* Carson, 4 Dev. & B. (N. C.) L. 388.

mortgagees.[1] And the lien created by the attachment stands on as high and equitable grounds as a mortgage on the same land.[2] The lien can only be released or discharged by the creditor himself. The officer has no control over the lien, because he acquires no specific property in land by means of his levy thereon.[3]

§ 53. **Land previously conveyed.**—Although an attachment creates a lien paramount to any right acquired by alienation, either by the act of the defendant or the operation of law,[4] as shown in the above section, yet since the lien takes effect at the time the levy is made, the rule in most states is, that the levy will not cut off the rights of a person who has acquired title in good faith, even though his deed be not recorded and the attaching creditor have no notice of the conveyance.[5] Especially where the grantee is in possession.[6] Open and exclusive possession of land, with claim of title for any considerable time, will, in Vermont, affect an attaching creditor of a third person (in whom the record of evidence of title is), with notice of a deed from his debtor to the party in possession, though such deed were recently given and recorded.[7] The registry in California does not protect attaching creditors, but only purchaser or mortgagees for value, from an unrecorded deed.[8] In Missouri an unrecorded mortgage takes priority over an attachment, provided it is recorded before judgment and sale on execution in the attachment suit.[9] But this is not so in Kansas if the attaching creditor has no notice of the existence of the mortgage.[10] If the grantee of an unrecorded deed has con-

1. Schacklett & Glyde's Appeal, 14 Pa. St. 326.

2. Carter *v.* Champion, 8 Conn. 549.

3. Brayley *v.* French, 28 Vt. 546. Further as to "The Lien Created by Attachment," see *post*, § 313.

4. Grigg *v.* Banks, 59 Ala. 311.

5. Cox *v.* Milner, 23 Ill. 422; Harral *v.* Gray, 10 Neb. 186; Savery *v.* Browning, 18 Iowa 246. *Contra* Stowe *v.* Meserve, 13 N. H. 46; Garwood *v.* Garwood, 9 N. J. L. (4 Hals.) 193. Compare Jones *v.* Mitchell, 158 Mass. 385, 33 N. E. Rep. 609. Stevens *v.* Morse, 7 Me. (7 Greenl.) 36.

6. United States *v.* Howgate, 2 Mackey (D. C.) 408; Kent *v.* Plummer, 7 Me. (7 Greenl.) 464.

7. Rublee *v.* Mead, 2 Vt. 544.

8. Plant *v.* Smythe, 45 Cal. 161.

9. Reed *v.* Ownby, 44 Mo. 204; Sappington *v.* Oeschli, 49 Mo. 244.

10. Northwestern F.Co.*v.* Mahaffey, 36 Kan. 152. See further as to priorities of liens, *post*, § 401.

veyed the premises to another and the last deed has been recorded before the attachment, this can not be regarded as giving notice of such unrecorded deed.[1] Even where such grantee gave back a mortgage to the grantor at the same time, and this mortgage was recorded before the attachment, the recording of the mortgage is no notice of the unrecorded deed.[2]

Where the party suing out the attachment is bound by law to take notice of a paramount outstanding equitable title, or where he has actual notice thereof, the attachment of a merely legal title can not be made to operate as against the equitable owner of the real estate.[3]

Land previously conveyed by a minor, by a deed which has neither been avoided nor confirmed by him after coming of age, is not liable to an attachment at suit of his creditors.[4]

In Massachusetts an attachment of the interest of one tenant in common in land is paramount to a partition unknown to the attaching creditor at the time of his attachment.[5] And he may, after judgment, levy his execution on the whole estate in common.[6] But in Maine the levy of the attachment does not prevent the other owners from procuring legal partition of the estate. Such partition, however, will not destroy the attachment lien. It will remain on that part of the real estate set off to the debtor.[7]

Where there is an unrecorded defective deed conveying the debtor's land, such debtor still has an interest in the land susceptible of being attached. If such land is attached and sold

1. Roberts *v.* Bourne, 23 Me. 165.

2. Veazie *v.* Parker, 23 Me. 170.

Where one conveyed land to another by a deed duly executed and acknowledged, and before the deed was recorded, procured a writ to be made upon a note upon himself and a third person, and caused the land to be attached in the name of such third person and execution was subsequently levied thereon, it was held that the third person, if he would avail himself of the attachment, must be charged with the knowledge of the previous conveyance. Hovey *v.* Blanchard, 13 N. H. 145.

3. Tucker *v.* Vandermark, 21 Kan. 263.

4. Kendall *v.* Lawrence, 22 Pick. (Mass.) 540.

5. McMechan *v.* Griffing, 9 Pick. (Mass.) 537.

6. Munroe *v.* Luke, 19 Pick. (Mass.) 39.

7. Inhabitants of Argyle *v.* Dwinel, 29 Me. 29.

as the property of the vendor, a purchaser without notice of the equity will take good title thereto.[1]

§ 54. **Land conveyed in fraud of creditors.**—Attaching creditors have a right to treat a previous conveyance of the land attached as having been made in fraud of them, and when such fraud is established in the conveyance, the attachment creates a lien with the same effect as though no conveyance had been made.[2] And a general attachment of all a debtor's interest in any real estate in the county will be sufficient to hold real estate fraudulently conveyed by him by a deed duly recorded.[3] And one who subsequently, and with notice of the attachment, purchases the land from the alleged fraudulent grantee, took subject to all equities which could be enforced against him.[4] But if a conveyance of land be fraudulent as to creditors, the title has nevertheless passed to the grantee and will remain in him until some creditor defeats it by the levy of an execution; and when defeated, it is then not rendered void *ab initio*, but only from the time when the creditor levied upon it. Therefore, if the grantee has entered into possession, and cultivated the land upon his own account, the creditors of the grantor can not attach the annual crops. They can only attach and levy upon that which their debtor owned and fraudulently conveyed.[5]

§ 55. **Land held in trust.**—It may be said in general, that where the title to land is held in trust for another, such *cestui que trust* has an interest therein susceptible of attachment.[6] The trustee can not be charged for the real estate in possession; but he may, by reason of the real estate, be indebted to the principal in such a manner as to render him chargeable.[7] An

1. Paine *v.* Mooreland, 15 Ohio 435.

2. McKinney *v.* Farmers', etc., Bank, 104 Ill. 180; Williams *v.* Michenor, 11 N. J. Eq. (2 Stockt.) 520.

3. Pratt *v.* Wheeler, 6 Gray (Mass.) 520.

4. Arper *v.* Baze, 9 Minn. 108.

5. Jones *v.* Bryant, 13 N. H. 53.

6. Davenport *v.* Lacon, 17 Conn. 278; Bray *v.* Wallingford, 20 Conn. 416.

As to "Garnishment," see *post* Vol. II.

7. Wright *v.* Bosworth, 7 N. H. 590., One who holds lands in trust for the separate use of the wife can not be charged, by reason of such land, as the trustee of the husband. Wright *v.* Bosworth, 7 N. H. 590.

attachment issued and laid in the hands of a trustee may be effective upon a sum ascertained by a final account to be the distributive share of the debtor. But it can not, before a final account, affect the fund or the trustee, or compel any modification of the final account for the benefit of the attaching creditor.[1]

Although a conveyance to a trustee may have been fraudulent as to creditors, yet if the creditors have not avoided the conveyance, the trustee will not be charged, in foreign attachment, for the income of the lands conveyed to him by the principal debtor and his wife.[2] And a trustee who, in fraud of the creditors, acquires land of a defendant in attachment, and afterwards sells it, is only chargeable for the profit of the transaction.[3]

The interest which a trustee himself holds subject to the equity of his *cestui que trust* is not subject to attachment.[4] For though he has the record title of real estate, he is still in fact but a trustee thereof, and his creditors, though ignorant of the trust, can acquire no right to the land by attachment or levy, as against the *cestui que trust;* and a court of chancery will, where the trustee is in equity bound to convey the property to the *cestui que trust*, decree a conveyance to the latter from the levying creditor.[5]

§ 56. **Land owned by one when consideration paid by another.**—If one person pays his own money and procures a conveyance of land or a transfer of a mortgage to a third person he has no attachable interest in the land so conveyed.[6] If A conveys land to B on a consideration moving from C, C will have no attachable interest in the land.[7]

Real estate of which the debtor has only an instantaneous

1. McPherson *v.* Snowden, 19 Md. 197.
2. Heywood *v.* Brooks, 47 N. H. 231.
3. Pittsfield Bank *v.* Clough, 43 N. H. 178.
4. Piatt *v.* Oliver, 2 McLean (U. S.) 267.
5. Hart *v.* Farmers', etc., Bank, 33 Vt. 252.
6. Reed *v.* Woodman, 4 Me. (4 Greenl.) 400; Kempton *v.* Cook, 4 Pick. (Mass.) 305.
7. Howe *v.* Bishop, 3 Metc. (Mass.) 26.

seizin is not subject to attachment.[1] For example, A conveyed land to B, merely for the purpose of enabling B to convey the same to C, and B conveyed the same to C accordingly. Before the deeds were recorded S attached the land as the property of B, and subsequently levied an execution thereon. It was held that B had no attachable interest in the land after he had conveyed it to C, and that S could not hold the land against C.[2]

§ 57. **Land owned jointly.**—The interest of one tenant in common in real estate may be the subject of attachment.[3] And if a creditor attaches the estate of his debtor held in common with others, it seems that it will not prevent the other part owners from procuring a legal partition of the estate, and that such partition if made will not vacate or destroy the attachment, but the attachment lien will remain on that part of the estate set off to the debtor. But if the attachment be followed by judgment and execution and there has been no partition of the estate, the levy can not be legally made upon the debtor's estate as a common and undivided estate, in disregard of the rights of others legally acquired. To be effectual to convey the title the levy must be made upon the estate assigned to the debtor to be by him held in severalty.[4]

When a plaintiff obtains a judgment against two defendants on a demand which is both joint and several, he may levy an attachment on the interests of both defendants in land, whether their interests therein be joint or several.[5]

Where a husband and wife hold real estate, and the old rule as to tenancy still maintains, they each hold the land by entireties and the whole estate will go to the survivor upon the death of the other.[6] Neither is seized of a moiety and neither has separate attachable interest during the lifetime of the other.[7]

1. Chickering *v.* Lovejoy, 13 Mass. 51.

2. Haynes *v.* Jones, 5 Metc. (Mass.) 292.

3. McMechan *v.* Griffing, 9 Pick. (Mass.) 537; Munroe *v.* Luke, 19 Pick. (Mass.) 39.

4. Inhabitant of Argyle *v.* Dwinel, 29 Me. 29.

5. Hewitt *v.* Durant, 78 Mich. 186, 44 N. W. Rep. 318.

6. Jackson *v.* Stevens, 16 Johns. (N. Y.) 110.

7. Taul *v.* Campbell, 7 Yerg. (Tenn.) 319; Brownson *v.* Hull, 16 Vt. 309; Fairchild *v.* Chastelleux, 1 Pa. St. 176; Gibson *v.* Zimmerman, 12 Mo. 385.

Where each owns title to real estate separately, the land of each is of course attachable to enforce a demand against the owner. Where real estate, the title to which was in the name of S. H. Loring, was attached in one suit as the property of Sarah H. Loring, and, in another, as that of Sheldon H. Loring, who was Sarah's husband, it was held that the burden of proof was upon the party claiming that the last attachment was entitled to priority, to show that the property belonged to the husband.[1]

§ 58. **Equities in land—Generally.**—The rule generally obtains that a mere equity in land is not attachable and that only a legal interest in land may be attached. A few states, however, permit it, but the right depends upon the provisions of the statutes and the constructions the courts have given thereto. In Tennessee it is said that an attachment issued by a court of law can not be levied upon property of an equitable nature. Attachments are there permitted in courts of equity, but the bill must be framed with that view.[2] And unless particularly indicated, an attachment upon land as the property of the defendant will be construed as intending to attach a legal interest. Therefore, if the defendant have only an equity, a sale under such attachment will convey no title.[3] Likewise, in Virginia, the attachment of an equitable interest in the land is only accomplished by a bill in equity properly framed.[4] In California, where the word "land" embraces all title, legal or equitable, perfect or imperfect, including such rights as lie in contracts, any interest in land is subject to attachment or execution.[5] So also in Kansas attachment may be levied upon land, although the debtor holds only the equitable title, and the legal title is in another.[6] And in Kentucky an equitable interest in real estate owned by a non-resident is subject to levy and sale, under a general attachment.[7] Connecticut declares

1. Allen *v.* Loring, 37 Iowa 595.
2. Hillman *v.* Werner, 9 Heisk. (65 Tenn.) 586.
3. Lane *v.* Marshall, 1 Heisk. (57 Tenn.) 30.
4. Barksdale *v.* Hendree, 2 Patt. & H. (Va.) 43.
5. Fish *v.* Fowlie, 58 Cal. 373.
6. Bullene *v.* Hiatt, 12 Kan. 98.
7. Bank of Louisville *v.* Barrick, 1 Duv. (Ky.) 51.

that the great principle of our law regulating the intercourse of debtor and creditor is, that all the property of the debtor shall be responsible for the debts of the owner. This not only includes the fee, but equitable interest, estates for life or years and an equity of redemption.[1] The Illinois law provides that the legal or equitable interest of a debtor in land may be seized on attachment. This will include the equitable estate of a married woman given her for life in a marriage settlement.[2]

§ 59. **Equity of redemption.**—The courts of last resort of the different states are divided on the question as to whether or not an equity of redemption is an interest in land susceptible of attachment. In Connecticut and Vermont it is said that the attachment of an equity of redemption creates a lien in favor of the attaching creditor, giving him the same right to redeem that his debtor has.[3] And he may redeem from a prior incumbrance, even before judgment, in order to make his own claim beneficial to himself.[4] In New Hampshire,[5] Massachusetts,[6] and Maryland, an equity of redemption of real estate is liable to attachment.[7] In Maine the mortgagor's right in the mortgaged premises may be attached after having tendered to the mortgagee the amount of his claim, and mere inconvenience, however great, in making such a tender, will not authorize him to disregard any plain provisions of the statute.[8] In Tennessee a creditor of a non-resident debtor may attach the debtor's right of redemption in land sold under execution, and

1. Bray *v.* Wallingford, 20 Conn. 416.

2. Wallace *v.* Monroe, 22 Ill. App. 602.

If real estate is attached and another person claim to own it, it is error to make him a co-defendant. Boston *v.* Wright, 3 Kan. 227.

3. Lyon *v.* Sandford, 5 Conn. 544; Chandler *v.* Dyer, 37 Vt. 345.

4. Chandler *v.* Dyer, 37 Vt. 345.

If a grantee seek to make a deed of the equity of redemption of the grantor in real estate available against the attaching creditor of the grantor, he must prove the registry of the deed in the proper office or notice of the attaching creditor, before attachment. Slocum *v.* Catlin, 22 Vt. 137.

5. Eastman *v.* Knight, 35 N. H. 551.

6. Bigelow *v.* Willson, 1 Pick. (Mass.) 277, 485; Bacon *v.* Leonard, 4 Pick. (Mass.) 277.

7. Pratt *v.* Law, 9 Cranch (U. S.) 456.

8. Foster *v.* Perkins, 42 Me. 168.

subject such interest to the satisfaction of his demand. But this must be done in a court of equity.[1]

§ 60. **Mortgagee's interest.**—As a general rule the mortgagee of real estate has no attachable interest in the land under his mortgage, before a foreclosure thereof, even when he has entered into possession.[2] Even after condition broken by the mortgagor and entry upon the premises by the mortgagee, the mortgagee has no attachable interest in such real estate.[3] The mortgagee in possession under the mortgage has no attachable interest until such title is perfected; that is to say, not until complete foreclosure and the equity of redemption is cut off by the lapse of time required therefor by the statute.[4] In one case, however, in Massachusetts, where a mortgagee was in possession of the real estate covered by his mortgage and was also in possession of some machinery located thereon, an attachment of the machinery was permitted, although the same was fixed to the real estate.[5] In Vermont a mortgagee has an attachable interest in the lands mortgaged.[6]

§ 61. **Legal title subject to the equity of redemption.**—The purchaser of real estate on the foreclosure of a mortgage has no attachable interest in the real estate purchased until the expiration of the time in which the statute prescribes that such real estate may be redeemed from the mortgage.[7] In proceedings commenced against a non-resident by attachment of land, where it appears that before conveyance to the defendant the legal title was conveyed to the sheriff, under the insolvent

1. Herndon *v.* Pickard, 5 Lea (Tenn.) 702.

In Mississippi a judgment creditor is not a purchaser for value within the meaning of the statute, but is a mere volunteer and can not levy an attachment. Kelly *v.* Mills, 41 Miss. 267.

2. Lincoln *v.* White, 30 Me. 291; Thornton *v.* Wood, 42 Me. 282; Smith *v.* People's Bank, 24 Me. 185; McLaughlin *v.* Shepherd, 32 Me. 143; Courtney *v.* Carr, 6 Iowa 238; Columbia Bank *v.* Jacobs, 10 Mich. 349; McGurren *v.* Garrity, 68 Cal. 566; Marsh *v.* Austin, 1 Allen (Mass.) 235; Portland Bank *v.* Hall, 13 Mass. 207; Eaton *v.* Whiting, 3 Pick. (Mass.) 484; Blanchard *v.* Colburn, 16 Mass. 345.

3. Crocker v. Bank, 24 Me. 185.

4. Thornton *v.* Wood, 42 Me. 282.

5. Gale *v.* Ward, 14 Mass. 352.

6. Barrett *v.* Sargeant, 18 Vt. 365.

7. Rogers *v.* Wingate, 46 Me. 436; Thornton *v.* Wood, 42 Me. 282.

laws, subject to redemption by the grantor on payment of the debts, and that the right of redemption had been sold by order of the court in an action pending at the time of conveyance to defendant, the action was not sustained.[1]

§ 62. **Interest of legatees, devisees, reversioners, remaindermen, etc.**—In Pennsylvania the rights of legatees, devisees and other like rights are liable to attachment.[2] And in New Jersey a mere personal legacy is not attachable, unless charged on real estate. It may then be attached in the devisee's hands for the debt of the legatee.[3] In Michigan a farm was devised to the testator's wife for life, subject to the payment out of the proceeds therefrom of certain legacies, and after the widow's death the balance of the farm was to go to the testator's two sons; and it was held that the interest of either of the sons was liable to attachment by a creditor.[4] But in Tennessee, where a testator left all his property to his widow, to be used by her for the support and education of their children, allowing her, at any time she might choose, to advance a portion of the estate among the children, it was held that the children had no such vested interest in the real estate as to be subject to attachment by their creditors.[5] So, too, in North Carolina, a testator bequeathed as follows: "I give and bequeath to my sons, A, B, C and D, and their heirs, four hundred and forty acres of land, my two negroes, which I wish sold, and the proceeds equally divided among my said four sons, etc., after my funeral expenses and debts are paid out of the same," and it was held that the sons did not take such an estate in either the land or negroes as to be subject to execution or attachment, but that they were only entitled to divide the proceeds of the sale of the property which the executor was directed by the will to make.[6] In Vermont a testator devised one-half his farm to his son, the use of the other half to his widow, and empowered

1. Culbertson's Representative *v.* Stevens, 82 Va. 406, 4 S. E. Rep. 607.
2. Roth's Appeal, 94 Pa. St. 186.
3. Woodward *v.* Woodward, 9 N. J. L. (4 Hals.) 115.
4. Hewitt *v.* Durant, 78 Mich. 186, 44 N. W. Rep. 318.
5. Sturm *v.* White, 8 Baxter (Tenn.) 197.
6. McLeran *v.* McKethan, 7 Ired. (N. C.) Eq. 70.

the executor at her decease to sell her half, pay a certain part of the proceeds to his daughter and the balance to the son. The executor declined the trust, but the son, widow and daughter paid the debts. At the widow's decease one-half the farm was worth only as much as was to be given to the daughter. The son and daughter treated the farm as belonging to them jointly, carried it on under an agreement by which each was to own one-half, and share alike, and the sister's share was set apart for her. It was held not to be within their power to make such arrangement, and that, therefore, what was the sister's share could not be attached by the brother's creditors.[1]

In Maine a reversionary interest in the lands is liable to attachment.[2] But in South Carolina a parent settled upon his daughter, at her marriage, certain property, with a reversion to himself in the property in case of her dying without issue during his life, and it was held that his reversionary interest could not be affected by his creditors.[3]

A contingent equitable interest in real estate is not attachable at law.[4] Neither can the judgment creditor of a remainderman reach an interest in the money paid into court in proceedings to condemn the land for a railroad, so long as the life estate exists.[5]

§ 63. **Interest in land under contract to purchase.**—In states where equitable interests in general are not attachable, a person having only a right to the title to land upon the payment of a certain sum has no attachable interest in the land before the title is so acquired.[6] A purchaser of land even though in possession has not an attachable interest in the land, before taking a conveyance, unless the purchase-money has been fully paid.[7] Therefore the interest a debtor acquires in the land, by a contract with the owner to cut and manufacture the timber on the

1. Hawkins *v.* Hewitt, 56 Vt. 430.

2. Moore *v.* Richardson, 37 Me. 438.

3. Le Prince *v.* Guillemot, 1 Rich. (S. C.) Eq. 187.

4. Kendall *v.* Gibbs, 5 R. I. 525.

5. Kansas City, Springfield, etc., R. R. Co. *v.* Weaver, 86 Mo. 473.

As to dower, interest and interest by the curtesy initiate, see *ante*, § 52.

6. Garlick *v.* Robinson, 12 Ga. 340.

The attaching creditor will get no title to land when the attached debtor gets his title after the attachment is levied. Crocker *v.* Pierce, 31 Me. 177.

7. Richards *v.* M'Kie, 1 Harp. (S. C.) Ch. 184.

land at a saw-mill erected by the debtor for the purpose, with a stipulation of the owner of the land to buy the mill or sell the land, at his election, after the timber is cut and manufactured, has no attachable interest in the land.[1] Nor does one who occupies land under a contract of purchase with the right to cut and sell wood growing thereon, upon condition of accounting to the owners, for the receipts after reimbursing his expenses, have an attachable interest in the wood.[2]

In other states where equitable interests are attachable generally, or where, like in California, the word "land" embraces all titles, legal and equitable, perfect or imperfect, including such rights as lien in contract, those executory as well as those executed,[3] the interest of a contract-purchaser is attachable. And where such contract rights are attachable, an attachment of "all the right, title, and interest" of the debtor, "in and to the said real estate described in" a contract for the conveyance of real estate, will create a valid lien upon all the debtor's right by virtue of such contract.[4] And where the interest of a debtor in a bond or contract for a conveyance of real estate on certain conditions is attached, a subsequent agreement to extend the time of performance of the conditions will follow the contract, and the attaching creditor will have the benefit thereof.[5] By virtue of the code of New York "the real property which may be levied upon by virtue of a warrant of attachment includes any interest in real property either vested or not vested, which is capable of being alienated by the defendant," and therefore the interest of a defendant in possession of the land under a contract of purchase, on which he has made partial payments, and under which he is entitled to a conveyance upon the completion of his payments, may be levied upon by virtue of an attachment.[6]

1. Dodge *v.* Beattie, 61 N. H. 101.
2. Provis *v.* Cheves, 9 R. I. 53.
3. Fish *v.* Fowlie, 58 Cal. 373.
4. Whitmore *v.* Woodward, 28 Me. 392.
5. Whitmore *v.* Woodward, 28 Me. 392.
6. Higgins *v.* McConnell, 130 N. Y. 482, 29 N. E. Rep. 978.

CHAPTER IV.

WHAT PROPERTY MAY NOT BE ATTACHED.

§ 64. Exempt property—(a) Generally.
65. (b) Provisions for the family.
66. (c) Wearing apparel.
67. (d) Household furniture.
68. (e) Animals used in one's business or in support of the family.
69. (f) Tools used by mechanics, and "implements of husbandry."
§ 70. (g) Animals, tools, etc., used in public service.
71. (h) Homestead and money received therefrom.
72. Who entitled to exemption—(a) The head of a family.
73. (b) Not a non-resident.
74. How exemption obtained.
75. Waiver of claim of exemption.

§ 64. **Exempt property—(a) Generally.**[1]—It has been hereinbefore said that whatever property is liable on execution is liable on attachment.[2] And likewise it may be here affirmed that whatever is exempt from execution is exempt from attachment, for no property can be attached which can not be sold on execution after judgment is obtained in the attachment suit,[3] because an attachment lien can only be enforced by sale under execution of the property which has been attached.[4] The exemption of property from attachment and execution is purely of statutory enactment and has no further extent and force than the statute gives it, by strict construction.[5] The exemption laws are intended to provide for the comfort of the debtor and

1. The provision of Illinois Revised Statutes that "no property" shall be exempt from sale for a liability incurred for the purchase or improvement thereon, relates only to real estate. Wells *v.* Lilly, 86 Ill. 317; Howard *v.* Lakin, 88 Ill. 36.

As to exemption of money due for labor, *i. e.*, "wages," see "Garnishment," *post*, Vol. II.

2. See *ante*, § 28.

3. Davis *v.* Garett, 3 Iredell (N. C.) 459; Parks *v.* Cushman, 9 Vt. 320; Commissioners *v.* Riley, 75 N. C. 144; Nashville Bank *v.* Ragsdale, Peck (Tenn.) 296; Handy *v.* Dobbin, 12 Johns. (N. Y.) 220; Emerson *v.* Bacon, 58 Mich. 526.

4. Myers *v.* Mott, 29 Cal. 359.

5. State *v.* Laies, 46 Mo. 108.

his family.[1] But the supreme court of Alabama has pertinently said that "it may be gravely doubted whether the law of exemption in this state can be invoked in favor of absconding debtors and debtors about to remove out of the state."[2] And Pennsylvania holds that the exemption law does not operate in favor of defendants who have rendered themselves subject to be sued by foreign attachment.[3] And that if the defendant has fraudulently concealed or disposed of his property he can not invoke aid of the exemption law.[4] But this question seems not to have been adjudicated in most of the states.[5]

Where the exemption allowed is of specific things *in numero*, the number of articles exempt is not double when the ownership is of an undivided half of each. Therefore, one owning an undivided half of a yoke of oxen and of a yoke of steers, and of more than twenty sheep, is entitled to an exemption in either the oxen or the steers, and the statutory number of sheep, and not in both oxen and steers and in twice the statutory number of sheep.[6]

It will be well for the practitioner to remember, in this connection, that where an attachment has been made upon exempt property and the property has been thereafter released, the levy will nevertheless bring the defendant before the court.[7]

§ 65. (b) **Provisions for the family.**—The statutes of most states make specific exemption of certain articles of food, or animals for food.[8] But the articles for food must be in themselves suitable and necessary to be used for that purpose. It

1. Knabb *v.* Drake, 23 Pa. St. 489.

Who is entitled to exemption, and how exemption is secured, will appear in §§ 72-75.

2. McBrayer *v.* Dillard, 49 Ala. 174. Allowed in Bonnell *v.* Dunn, 29 N. J. L. 435, *post*, §§ 72 and 73.

3. Yelverton *v.* Burton, 26 Pa. St. 351.

In Missouri the wife of a non-resident defendant may intervene and claim her exemption. Lindsey *v.* Dixon, 52 Mo. App. 291.

4. McCarthy's Appeal, 68 Pa.St.217.

5. Emerson *v.* Smith, 51 Pa. St. 90, *post*, § 73.

6. White *v.* Capron, 52 Vt. 634.

7. Hadley *v.* Bryars, 58 Ala. 139.

8. As to animals, see *post*, § 68. Butter made from the milk of a debtor's only cow is not liable to attachment and execution. Leavitt *v.* Metcalf, 2 Vt. 342.

is not sufficient that the articles sought to be exempted may, by sale or exchange, indirectly contribute to the sustenance of the debtor or his family.[1] And a statute exempting a certain quantity of wheat does not exempt a barrel of flour purchased by the debtor, manufactured from grain of which he had never been the owner.[2] And a statute exempting one hog and the pork of the same, when slaughtered, from attachment and execution, does not protect from such process both a hog and the pork of a slaughtered hog.[3]

§ 66. (c) **Wearing apparel.**—It is a universal rule that the necessary apparel is exempt from execution and attachment, and it has been said that the statute exempting the necessary wearing apparel exempts suitable apparel for labor, with an extra suit for days of religious worship, and an overcoat at all seasons of the year.[4]

§ 67. (d) **Household furniture.**—Certain household furniture is generally exempted by statute from levy on execution or attachment. But in order that such furniture may be exempted it is not enough that the article is suitable for household furniture; it must be made to appear that it was actually used as such, or is intended to be so used. The court will not assume that they were exempt.[5] Nor is it sufficient to prove that it is the kind the law exempts; there must be proof that it is exempt.[6] Under a statute exempting "all beds, bedsteads, and bedding kept and used for the debtor and his family," the exemption of bedsteads and bedding actually used by the debtor's family is not affected by the fact that there are other beds of the debtor not levied upon, unless it is shown affirmatively that the whole number is greater than is necessary or convenient for the use or comfort of the family.[7] In Connecticut a

1. Blake *v.* Baker, 41 Me. 78.
A swine, though killed and dressed, is exempt. Gibson *v.* Jenney, 15 Mass. 205.
2. Tucker *v.* Lane, 23 Me. 537.
3. Parker *v.* Tirrell, 19 N. H. 201.
4. Peverly *v.* Sayles, 10 N. H. 356.
But a traveling trunk, a cabinet box and a breast pin have been held not to be exempt. Towns *v.* Pratt, 33 N. H. 345.
5. Bourne *v.* Merritt, 22 Vt. 429.
6. Rollins *v.* Allison, 59 Vt. 188.
7. Heath *v.* Keyes, 35 Wis. 668.

widow who supported herself and daughter by keeping a boarding-house, and who owned a quantity of furniture suitable for a boarding-house, took a furnished house for a year in the city of New York, and went there to keep boarders, intending to return at the end of the year and resume her business as before. Her furniture was stored in the meantime in Connecticut, and while so stored was attached by a creditor. It was held (1) That the furniture, if otherwise exempt, did not become open to attachment by reason of its being stored and not in actual use. (2) That the furniture was not exempt as being necessary for the use of her boarders, nor on the ground that the boarders were a part of her family. (3) That the inquiry was as to what was necessary for the personal comfort of the family, as such; but that the term "family" in this case was not limited to the mother and daughter alone, but, as she was keeping boarders, might properly include a servant, and in any case would include a visitor or a dependent relative who was living in the family. (4) That in determining what was necessary household furniture, her occupation might properly be considered, and if the fact of her keeping boarders made it necessary for her to have more furniture for her personal use, as an additional bureau, or other like convenience, such additional furniture would be exempt.[1] Where the debtor's family consists of himself and wife and three young sons, two beds only may be exempted from attachment as necessary, but it will be otherwise if the children are of different sexes.[2] And a householder, who has neither wife nor child, is entitled to but one bed, bedding, etc., as exempted from attachment and not to another used by persons boarding with him.[3]

1. Weed *v.* Dayton, 40 Conn. 293.

Where the principal debtor who, as a hotel keeper, had owned and had used in that business five carpets, five dozen knives and forks, seven large fluid lamps, twenty small fluid lamps, two fluid cans, five pails, twelve tumblers, eighteen goblets and a few other articles of household furniture, allowed his successor in the hotel to use them in the same business, it was held, that the property was exempt from attachment; in an action against the principal debtor, where the person in possession of these articles was summoned as trustee and sought to be made chargeable therefor. Clark *v.* Averill, 31 Vt. 512.

2. Glidden *v.* Smith, 15 Mass. 170.

3. Brown *v.* Wait, 19 Pick. (Mass.) 470.

A cooking stove is an article of household furniture, necessary for upholding life, within the meaning of the statute exempting such articles from attachment and execution.[1]

An officer attaching household furniture within the class exempted from attachment is bound to leave with the debtor at least articles aggregating the value exempted by the statute.[2] And when articles of household furniture which are exempt from attachment are intermingled with other similar articles not so exempt in the house of the owners, this is not such a confusion of goods as will justify an officer in attaching all of them upon failure of the owner to claim any of the articles as exempt.[3]

§ 68. (e) **Animals used in one's business, or in support of the family.**—Most states make some provision by statute for the exemption of "beasts of husbandry," and domestic animals which contribute to the support of the debtor or his family; and the provisions exempting such property from attachment are applicable to a foreign debtor temporarily resident in the state, unless he is especially exempted therefrom by statute.[4] And when such exemption is made, it is not a necessary coincident, at the time of the levy, that the animal be in actual use. It is sufficient if the owner keep it with the honest intention and purpose of using it within a reasonable time.[5] Therefore, under the statute exempting "two horses kept and used for team work," a horse kept with an honest intention of using it for team work within a reasonable time can not be attached.[6] Statutes relating to exemptions are to be liberally construed, consequently a horse generally used "for team work" should be held exempt, although he is not exclusively kept for that purpose.[7] A statute exempting a horse from at-

1. Crocker *v.* Spencer, 2 D. Chip. (Vt.) 68; Hart *v.* Hyde, 5 Vt. 328; Woods *v.* Keyes, 14 Allen (Mass.) 236; Brown *v.* Wait, 19 Pick. (Mass.) 470.

A time piece is a necessary article of household furniture. Leavitt *v.* Metcalf, 2 Vt. 342.

2. Mannan *v.* Merritt, 11 Allen (Mass.) 582.

3. Copp *v.* Williams, 135 Mass. 401.

4. Everett *v.* Herrin, 46 Me. 357.

5. Rowell *v.* Powell, 53 Vt. 302.

6. Steele *v.* Lyford, 59 Vt. 230, 8 Atl. Rep. 736.

7. Webster *v.* Orne, 45 Vt. 40.

tachment when required for actual use, does not mean that the horse must be so required at the moment of the attachment.[1] On the question as to whether the debtor's horse is required for other "actual use" than "teaming purposes," it may be shown that he used it to convey his children to school and to church.[2] Evidence of the circumstances of the employment and the needs of the debtor and his family is admissible on the question whether a horse is exempt from attachment or not.[3] Under a statute exempting from attachment "one or two horses not exceeding in value $100," a horse of greater value than that sum is not exempt.[4] And if there are two horses, neither of which is of that value and the value of both exceed it, the debtor may elect which one shall be exempt.[5] A statute exempting "beasts of the plow, not exceeding a yoke of oxen or a horse when required for farming or teaming purposes or other actual use," does not exempt a wagon or harness.[6] And one who claims and obtains his horse as exempt from attachment under such statute can not afterwards, if his title to the horse have proved invalid, contend that oxen attached at the same time were exempt.[7] A debtor who refuses to elect whether he will retain a horse or a pair of oxen as the exempt team, when requested so to do, can not complain because the oxen were attached and sold.[8] Under the statute exempting "one pair of working cattle," a bull which is used

1. Jaquith *v.* Scott, 63 N. H. 5; s. c. 56 Am. Rep. 476.

2. George *v.* Fellows, 59 N. H. 206.

3. George *v.* Fellows, 60 N. H. 398.

Where mules which have been conveyed to one in trust for a *feme covert* are kept upon the farm of her husband, a single horse owned by the husband has been held to be not exempt from attachment. Simonds *v.* Gulley, 7 Ala. 721.

4. Hughes *v.* Farrar, 45 Me. 72.

5. Everett *v.* Herrin, 46 Me. 357.

A, who owned two horses, only one of which was exempt from attachment, gave a bill of sale of one horse, describing it as "kept for team work and exempt from attachment;" there was no change of possession, and it was held that A had properly exercised his right of selection, that no change of possession was necessary and that such horse was therefore not liable to attachment. George *v.* Bassett, 54 Vt. 217.

6. Somers *v.* Emerson, 58 N. H. 48.

A butcher's only set of harness, though used and needed by him in his business, is not exempt from attachment under the Vermont statute. Carty *v.* Drew, 46 Vt. 346.

7. Barney *v.* Keniston, 58 N. H. 168.

8. Davis *v.* Webster, 59 N. H. 471.

for work is exempt, although the owner have no other cattle.[1] And where a debtor owns neither oxen nor horses, a colt which does not exceed the statutory value is exempt from attachment.[2]

In some states the debtor's only cow is exempt from execution and attachment.[3] And under such statutes a two-year-old heifer, not with calf, is exempt from attachment and execution, if the debtor have no other cow.[4] But under such statute, when cows have been attached, a debtor will not be heard to complain that the officer attached a particular cow unless he shows that he elected to retain one.[5] And if he have two cows and one of them be taken, he can not sue the officer in trespass on the ground that it was his only cow; supposing that the cow in his possession belongs to the estate of his deceased wife, he can not, on failing to sustain the exemption claimed, change his ground and claim the right to elect which of the cows shall be treated as exempt. His right of election will be deemed to have been waived because he did not attempt to exercise it at the time of the attachment.[6]

It seems that where an animal is claimed to be exempt from attachment such claim can not be sustained by proof that it is of the kind the statute exempts, but that it must be shown that it is exempt.[7]

When the necessary quantity of feed to keep the exempt animals is also exempt, it seems that the full amount exempted

1. Bowzey *v.* Newbegin, 48 Me. 410.

2. Kennedy *v.* Bradbury, 55 Me. 107.

A declaration made by a debtor to the creditor prior to the attachment that he had $5,000 of property, two yoke of oxen that could be attached, and that he should pay him soon, did not estop him from claiming his right to "one yoke of oxen or steers, as he may select." Haskins *v.* Bennett, 41 Vt. 698.

3. Haskill *v.* Andros, 4 Vt. 609; Freeman *v.* Carpenter, 10 Vt. 433; Hill *v.* Loomis, 6 N. H. 263.

And the butter, made from the milk of a debtor's only cow, is not liable to attachment and execution. Leavitt *v.* Metcalf, 2 Vt. 342.

4. Freeman *v.* Carpenter, 10 Vt. 433; Johnson *v.* Babcock, 8 Allen (Mass.) 583.

5. Howard *v.* Farr, 18 N. H. 457.

6. Sumner *v.* Brown, 34 Vt. 194. Further as to "How Exemption Obtained" and "Waiver of Claim of Exemption," see *post*, §§ 74, 75.

7. Rollins *v.* Allison, 59 Vt. 188.

by statute may be claimed, although a part of the winter is already passed.[1] But a debtor is not entitled to hold hay for the use of sheep exempt from attachment, unless he has sheep at the time of the attachment.[2]

§ 69. (f) **Tools used by mechanics, and "implements of husbandry."**—The statutes generally exempt the tools used by mechanics in the pursuit of their trade and the implements of husbandry used by husbandmen. The tools and implements exempt from seizure, however, are only such as are necessary for the mechanic to carry on his trade in the usual manner, and not all that are merely convenient for the exercise of the trade by which the debtor gains a living.[3] It is said that "working tools necessary for his usual occupation" should be construed to include not only all tools which are indispensably necessary to the mechanic, or even such as are in use by individuals of the same craft, but also such as the mechanic has adopted to ease and diminish his labor, and not only his working tools, so called in the dictionary and by learned men, but such as are so called by the craft, such as he uses and has set apart for the advantageous prosecution of his business.[4] And where one is engaged in two branches of business he may select as exempt from attachment the tools he uses in both trades, provided the value of the whole number selected does not exceed the value named by the statute as the limit of a mechanic's exemption.[5]

1. Kennedy *v.* Philbrick, 38 Me. 135.

2. Foss *v.* Stewart, 14 Me. 312.

3. Prather *v.* Bobo, 15 La. Ann. 524; Howard *v.* Williams, 2 Pick. (Mass.) 80.

4. Healy *v.* Bateman, 2 R. I. 454.

5. Barker *v.* Willis, 123 Mass. 194.

In this case the debtor was a tanner and had tanners' tools. He was also a musician and had a cornet. He worked at the tanner's trade and played the cornet at balls for pay. Both his cornet and tools were held to be exempt. Barker *v.* Willis, 123 Mass. 194.

The tools used by an apprentice or journeyman in jeweler's business have been held to be exempt, though the master (the debtor) worked principally on watches, his principal business being that of a jeweler. Howard *v.* Williams, 2 Pick. (Mass.) 80.

And a sewing machine of less value than that limited by the statute owned by one engaged in the manufacture of ready-made clothing, and used by a

It has been well said that to be entitled to the statutory exemption of implements of the debtor's trade and the tools used in carrying on his business, the debtor must be a mechanic, in contradistinction to a manufacturer; that the implements must be tools, in contradistinction to machinery; and that the trade must consist in the production of articles for the supply of the neighborhood or particular customers, in contradistinction to such as are intended for sale in the market. Therefore, where A, a spectacle-maker, and B, a blacksmith, who had formed a partnership and been engaged in the business of manufacturing German silver spectacles, employing in that business six workmen besides themselves, were commencing to manufacture cast-iron shears, when C, a creditor of the firm, attached all the implements used in making German silver spectacles and cast-iron shears, except the tools for one person, it was held that the articles attached were not implements of the debtor's trade within the meaning of the statute, and consequently were not exempt from C's attachment.[1] But in Massachusetts it was held that machines of simple construction, moved by the hand or foot, and used in the manufacture of boots, are exempt from attachment, even though the owner employed a number of men under him in carrying on his business, by whom the machines are generally used.[2]

The following examples may aid in determining what is and what is not a tool within the meaning of the statutes of exemptions: A barber's chair and foot-rest, used by a barber in his business, are exempt, as "tools."[3] Instruments used by a woman in making cheese, such as presses, vats, and knives, are exempt as "tools and instruments."[4] A grindstone kept and used on a farm in the ordinary manner is exempt, under a statute exempting such tools as are necessary for upholding

person employed by him has been said to be exempt from attachment, as necessary, if without it such business can not successfully be carried on, although the owner does not know how to use it himself. Dowling *v.* Clark, 3 Allen (Mass.) 570; Rayner *v.* Whicher, 6 Allen (Mass.) 292.

1. Atwood *v.* De Forest, 19 Conn. 513; Knox *v.* Chadbourne, 28 Me. 160.

2. Daniels *v.* Hayward, 5 Allen (Mass.) 43.

3. Allen *v.* Thompson, 45 Vt. 472.

4. Fish *v.* Street, 27 Kan. 270.

life.[1] A sled is also a "tool," but a wagon used for convenience or pleasure is not exempt;[2] neither is a daguerreotype apparatus which the owner has ceased to use for taking likenesses and is using only to teach the art to another, a "tool of his occupation;"[3] nor is a machine for shaving or splitting leather, operated either by hand, steam or water, costing $250, and weighing from six to nine hundred pounds, worked by turning a crank, and requiring two men to work it by hand, and when in use fastened to the floor by cleats, exempt from attachment and execution as a tool necessary for upholding life;[4] nor is a portable machine, called a "Billy and Jenny," used for spinning and manufacturing cloth, exempt;[5] neither are potash kettles set in arches in the usual way for use;[6] nor a horse and saddle owned by a cavalryman.[7] A violin and bow are exempt to a debtor whose sole business is that of a musician in a military and quadrille band, and who obtains most of his support by playing upon his violin, if the value is less than the sum exempt.[8] Where a mower and its reaper attachment are levied upon and the whole exceeds what the statute allows the debtor to claim, he may select the mower alone as exempt, the two being separable and the mower a complete machine without the attachment.[9] So, too, under a statute exempting the tools, implements and fixtures necessary for carrying on the business of a debtor, not exceeding $100 in value, a clock, stove, screen, pitcher, and table cover, used by a milliner, should be exempted, if they do not exceed that value and the jury find them to have been necessary, and if used in her business.[10] A lawyer's ordinary office furniture, including his table, necessary to carry on his business, is comprehended within the statutory clause, "the proper tools, instruments, or books of the debtor."[11] Where it is shown that

1. White *v.* Capron, 52 Vt. 634.
2. Parshley *v.* Green, 58 N. H. 271.
3. Norris *v.* Hoitt, 18 N. H. 196.
4. Henry *v.* Vheldon, 35 Vt. 427.
5. Kilburn *v.* Deming, 2 Vt. 404.
6. Wetherby *v.* Foster, 5 Vt. 136.
7. Fry *v.* Canfield, 4 Vt. 9.
8. Goddara *v.* Chaffee, 2 Allen (Mass.) 395.
9. Ramsey *v.* Barnabee, 88 Ill. 135.
10. Woods *v.* Keyes, 14 Allen (Mass.) 236.
11. Abraham *v.* Davenport, 73 Iowa 111, 34 N. W. Rep. 767.

a party depends entirely upon the trade of a printer and editor for means of support, his printing press and materials necessary for the exercise of a printer's trade are exempt.[1] Under a statute which exempts "one cart or truck-wagon," a peddler's wagon, designed to be used in trade from place to place, with the body hung upon three elliptic steel springs, with drawer behind and doors at the sides, and a railing around the top, and dasher in front, can not be attached.[2] Whether a physician's wagon and harness are "tools of his occupation," exempt from attachment, is a mixed question of law and fact. If reasonably necessary, they are exempt.[3] A wagon used for convenience or pleasure is not exempt, but a sled used for drawing timber to market is free from attachment as a tool of one's occupation.[4] Wheels of a cart, and the gear used in moving it with oxen, are not "tools" within the statute.[5] Nor is a wagon with patent couplings attached, used by the owner in carrying on his business of selling patent couplings;[6] neither is the stock of goods, scales and measures, horse, wagon, and harness, of a shopkeeper in the country.[7] But a shovel, pick-ax, dungfork, and hoe, used by a debtor in tilling his land, are exempt from attachment, although tilling land is not his principal business.[8]

A temporary suspension of the exercise of one's trade, when, as a matter of fact he intends to resume it, will not render a mechanic's tools liable to attachment.[9] Where a debtor was engaged in farming the year preceding the attachment, which was levied on March 16, when his lease had expired on the first of March and no other farm having yet been leased, the

1. Prather *v.* Bobo, 15 La. Ann. 524. Compare Buckingham *v.* Billings, 13 Mass. 82; Danforth *v.* Woodward, 10 Pick. (Mass.) 423.

2. Smith *v.* Chase, 71 Me. 164.

3. Richards *v.* Hubbard, 59 N. H. 158; s. c. 47 Am. Rep. 188.

4. Parshley *v.* Green, 58 N. H. 271.

5. Daily *v.* May, 5 Mass. 313.

6. Gibson *v.* Gibbs, 9 Gray (Mass.) 62.

7. Wilson *v.* Elliot, 7 Gray (Mass.) 69.

A grocer's stock in trade is not exempt from attachment under Stat. 1855, Ch. 264; Reed *v.* Neale, 10 Gray (Mass.) 242.

8. Pierce *v.* Gray, 7 Gray (Mass.) 67.

9. Caswell *v.* Keith, 12 Gray (Mass.) 351. See also as to "Waiver," *post*, § 75.

fact that he did not own a farm, or have a lease of one, and was not at the time of the levy engaged in the farming, was held not to be conclusive as to whether he was or was not a farmer, when he had testified that he was a man of a family and had been a farmer all his life.[1]

When the statute exempts implements of one's trade or business and the articles belonging to the debtor are plainly distinguishable as such, it is the duty of the officer to avoid the seizure of such articles, although the debtor make no demand for them. The seizure of such exempt articles will render the attaching officer liable for damages.[2] Although it has been said that where the statute makes no specific enumeration, but exempts merely the "implements or stock in trading, * * * used or kept for the purpose of carrying on his trade or business," the officer is not charged with knowledge of what is exempt thereunder, and that unless the debtor make his selection he will be deemed to have waived his right thereto and the officer may seize the whole without incurring any liability therefor.[3]

§ 70. (g) **Animals, tools, etc., used in public service.**—Animals, vehicles, tools and other personal property used in the service of the government are usually exempt from execution and attachment. As for example, a mail coach and horses while carrying the mail can not be seized, as it would be an obstruction of the mail within the meaning of the United States statutes.[4] But if the levy is made without knowledge of such use the officer may not incur any liability therefor. The exemption of articles required by the government is only applicable when such articles are in use, as where under a statute exempting "such military arms and accoutrements" as the debtor is required by law to furnish, it was held that the ex-

1. Hickman *v.* Cruise, 72 Iowa 528, 34 N. W. Rep. 316.

2. Wood *v.* Keyes, 14 Allen (Mass.) 236. See also as to "Levy," *post*, § 213, and as to "Liability of Executive Officer," *post*.

3. Behymer *v.* Cook, 5 Colo. 395. "How Exemption Obtained" and "Waiver of Claim of Exemption," see *post*, §§ 74–75.

4. Harmon *v.* Moore, 59 Me. 428.

emption was of a temporary character, continuing only so long as the debtor is bound by law to furnish them, and when the obligation ceases the exemption in that particular case ceases.[1]

§ 71. (h) **Homestead, and money received therefrom.**[2]— Most states provide for a "homestead" exemption of land within a certain valuation. This land is exempted to be used for a residing place for the debtor and his family. When there is such homestead exemption, the residence must be or must have been on the land claimed as such. Therefore, a levy on the debtor's land previous to his making of it a home will effect a lien, even though enforced by a sale made afterward. The exemption does not relate back.[3] But the fact that two parcels of land are a distance apart, will not prevent them from being protected from legal process, if each is used for homestead purposes. But when the homestead has been fixed upon one piece, there must be such use of the other in order to invest it with the homestead character as would be required to make an original designation of a homestead. Therefore, where a debtor resided on a prairie farm in one county, and had just purchased some woodland in another county, intending to use it in connection with the prairie place, and the woodland was attached before he did anything upon it, there could be no homestead exemption claimed of it.[4]

The debtor, however, can not be deprived of his homestead exemption. And where the homestead has been changed into money and the money is kept as a separate homestead fund, without being mixed with other money and without intent being shown to apply it to other purposes, it can not be attached.[5]

1. Owen *v.* Gray, 19 Vt. 543.

2. The statute in Illinois providing that no property shall be exempt from sale for debt or liability incurred for the purchase or improvement relates to real estate alone, and does not embrace personal property. Wells *v.* Lilly, 86 Ill. 317; Howard *v.* Lakin, 88 Ill. 36.

In Iowa, the law exempting a homestead has no application in attachment cases. Daniels *v.* Morris, 54 Iowa 369.

3. Kelly *v.* Dill, 23 Minn. 435.

4. Brooks *v.* Chatham, 57 Tex. 31.

5. Keyes *v.* Rines, 37 Vt. 260.

The same rule applies when the debtor comes from another state whose laws protect the homestead to the same extent as our own. And

And such fund is, even when deposited in a bank, exempt.[1] Money paid for right of way over the homestead by a railway is exempt, notwithstanding the fact that the character of the homestead as such is not destroyed by the easement.[2] But a homestead does not extend to new land exchanged for the old and not paid for, even though the debtor depended upon the money realized from the old to pay for the new, when the debtor claims homestead rights in the old.[3] Likewise insurance money received because of the destruction of exempt property is exempt from attachment for a reasonable time.[4] A judgment obtained for damage done to the home is exempt from attachment.[5] The fund recovered for destruction or damage to exempt property is exempt till after the debtor has had time to invest it in exempt property.[6]

It has been reasonably said that lath, shingles and lumber obtained by a debtor for the purpose of repairing the dwelling-house occupied by him as a homestead, and actually deposited upon land included in the homestead are exempt from seizure on attachment.[7]

The proceeds received from a voluntary sale and relinquishment of the homestead are, by the relinquishment, freed from their homestead character and are liable to attachment.[8]

the same rule applies where the wife holds the fund. Keyes *v.* Rines, 37 Vt. 260.

1. Kirby *v.* Giddings, 75 Tex. 679.

2. Kaiser *v.* Seaton, 62 Iowa 463.

3. Whittenberg *v.* Lloyd, 49 Tex. 633.

4. Cooney *v.* Cooney, 65 Barb. 524.

5. Mudge *v.* Lanning, 68 Iowa 641; Kaiser *v.* Seaton, 62 Iowa 463; Stebbins *v.* Peeler, 29 Vt. 289.

6. Tillotson *v.* Walcott, 48 N. Y. 188.

The rule exempting the money received for exempt property is not universal, however, because in Mississippi a plaintiff in replevin, who has recovered a judgment for a horse, or his value, and also for damages for the wrongful taking and detention of the horse, has no exemption therein because the horse is exempt. Johnson *v.* Edde, 58 Miss. 664.

And in Vermont debts due to a debtor which accrued from the sale of exempt property may be attached and holden by trustee process. Scott *v.* Brigham, 27 Vt. 561. See also in Pennsylvania, Knabb *v.* Drake, 23 Pa. St. 489.

Personal property held in lieu of homestead is exempt only from sale on execution and not from attachment under the Nebraska code, §§ 521–523, Maxwell, J., dissenting. State *v.* Sandford, 12 Neb. 425.

7. Krueger *v.* Pierce, 37 Wis. 269; contra, Carkin *v.* Babbitt, 58 N. H. 579.

8. Mann *v.* Kelsey, 71 Tex. 609.

§72. Who entitled to exemption—(a) The head of a family.[1]—The proper person to claim exemption, and in many cases the only person who is entitled to certain exemptions, is the head of the family. And where it is necessary that the claimant be such, and the property which is levied on be claimed as exempt is not made so specifically, the claim of exemption from attachment will be defective unless it shows that the debtor is the head of the family residing with the same.[2] But as already shown,[3] if the articles are specifically enumerated in the statute exempting them, the officer is charged with the knowledge of their exempt character and must not attach them, although no claim be made by the debtor.[4] If the husband is temporarily absent, the wife may claim the exemption for him.[5] The family of even an absconding debtor, it has been said, is entitled to exemptions for their benefit.[6] A married woman who has been abandoned by her husband, but who is living with and supporting her child, is the "head of the family."[7] And a deserted wife without any children is (in Illinois) a "family" within the meaning of the exemption laws.[8] But an itinerant dancing master who has no wife, but who has a minor son with whom he does not reside, and who owns a farm, which is leased to a tenant who takes care of his household furniture, etc., is not to be considered a head of a family within the statute exempting personal property from seizure.[9]

The term "householder" is, by some statutes, used as synonymous to "head of a family" in the other statutes. A "house-

1. There is no exemption, in Illinois, as against a demand for the wages of laborers or servants; but a traveling salesman and book-keeper does not come within either of these classes. Epps *v.* Epps, 17 Ill. App. 196.

The wife is the only one who, in Missouri, can claim the exemption of the rents, etc., of such married woman's real estate from attachment. Abernathy *v.* Whitehead, 69 Mo. 28.

2. McMasters *v.* Alsop, 85 Ill. 157; Alabama Conference *v.* Vaughan, 54 Ala. 443.

3. See *ante*, § 69.

4. McMasters *v.* Alsop, *supra;* Wood *v.* Keyes, 14 Allen (Mass.) 236.

5. McCarty's Appeal, 68 Pa. St. 217; Astley *v.* Capron 89 Ind. 167.

6. Bonnel *v.* Dunn, 29 N. J. L. 435; Lindsey *v.* Dixon, 52 Mo. App. 291; but see McBrayer *v.* Dillard, 49 Ala. 174, *ante*, § 64.

7. Nash *v.* Norment, 5 Mo. App. 545.

8. Berry *v.* Hanks, 28 Ill. App. 51.

9. Searcy *v.* Short, 1 Lea (Tenn.) 749.

holder" is defined to be one upon whom rests the duty of supporting the members of his family or household.[1]

§ 73. (b) **Not a non-resident.**—When it is necessary that the claimant be the head of a family it is also generally necessary that he reside with the same, within the jurisdiction of the court where the action is pending;[2] for a statute, exempting certain property for the use of every family in the state, does not protect property of one having a family in another state.[3] But where a husband comes within the jurisdiction of the court intending to make that his place of residence, his property will be exempt from execution and attachment in the same manner as if he were residing with his family, although his family be still residing elsewhere.[4] And it seems that where one who is a non-resident has brought property into the state for a temporary purpose only, may claim that it is exempt when by the law of the state of his residence it is so exempt, when the attachment is brought by a creditor whose residence is in the

1. Thompson on Homestead Exemptions, §§ 45, 46; Smyth on Homesteads and Exemptions, § 532.

The Indiana statute designates a "householder" as entitled to certain exemptions from attachment, and the court holds the statute to mean one who has members of his family dependent upon him for support and whom he supports. Lowry *v.* McAllister, 86 Ind. 543; Kelley *v.* McFadden, 80 Ind. 536; Bunnell *v.* Hay, 73 Ind. 452. Within this provision is held to be a father living with three children at the house of his father-in-law, where he paid the price of their board and supplied them with clothing and other necessaries (Lowry *v.* McFadden, 86 Ind. 543); a widower who employed a family to keep house for him and his adopted daughter, although the daughter was absent at the time on a visit to her natural mother (Bunnell *v.* Hay *et al.*, 73 Ind. 452); a widower continuing to occupy the same property the title to which has descended to the daughter, and while contributing to the support of the daughter's family which resides with him, though not dependent upon him for support—he paying the taxes on the property but no further consideration for its use (Bipus *v.* Deer, 106 Ind. 135); a widower without a child, remaining in the homestead and keeping a hired servant (Kelley *v.* McFadden, 80 Ind. 536); and an unmarried brother, while his sister lived with him, though she contributed to the expenses of the household, he directing and controlling the affairs (Graham *v.* Crockett, 18 Ind. 119).

2. McMasters *v.* Alsop, 85 Ill. 157; Alabama Conference *v.* Vaughan, 54 Ala. 443.

3. Allen *v.* Manasse, 4 Ala. 554.

4. Chesney *v.* Francisco, 12 Neb. 626; State, *ex rel.* Kahoon, *v.* Krumpus, 13 Neb. 266.

same state. In other words, the laws in one state will not permit a non-resident creditor to enforce a demand against a like non-resident debter when such demand could not be enforced in their home state.[1]

The fact, however, that the affidavit for the attachment alleges that the defendant is a non-resident and absconding debtor does not prevent the wife from claiming the exemptions allowed by the statute.[2] Where a wife, whose husband is fleeing from justice, sold part of the household goods and took the rest with her to her father-in-law's house in another state, where she was joined by her husband and resided until he was arrested and taken back into the former state in the same year, when she also returned, it was held that she had not abandoned her domicile in the former state and that she was entitled to the exemption of the household goods as the wife of the absconding husband.[3]

§ 74. **How exemption obtained.**—When the articles are specifically exempted by the statute, the officer is charged with the knowledge of their exempt character, and must not levy upon them. But if they are not specifically mentioned in the statute, the debtor must make a claim of the articles which he considers to be exempt, or the officer may take the whole without incurring any liability therefor.[4] And he may select such articles as he deems most beneficial.[5] The debtor should state to the attaching officer that certain articles are exempt, and that he desires them to be left free from attachment.[6] If the

1. Mumper *v.* Wilson, 72 Iowa 163, 33 N. W. Rep. 449.

2. Lindsey *v.* Dixon, 52 Mo. App. 291.

In Missouri she may make her claim to exemptions by an interplea duly filed. Lindsey *v.* Dixon, 52 Mo. App. 291.

3. Griffith *v.* Bailey, 79 Mo. 472.

4. Behymer *v.* Cook, 5 Colo. 395.

When a certain quantity (as of provision) is exempt, and the debtor, who has a larger quantity than the law exempts, sets apart no portion thereof for the use of his family before it is about to be attached, and makes no claim to any portion of it when the officer is about to attach the whole, he can not maintain an action against the officer who takes the whole. Clapp *v.* Thomas, 5 Allen (Mass.) 158; Nash *v.* Farrington, 4 Allen (Mass.) 157.

5. Jordan *v.* Gower, 1 Baxter (Tenn.) 103.

6. Frick *v.* Mulholland, 48 Wis. 413. In this case he stated that "it was

officer will not set aside the property claimed as exempt at the time of the levy, the defendant may make his claim at the term of the court to which the attachment is returnable. He certainly can make his claim at the trial of the case, but it will be too late to make it after judgment is entered, unless it was impossible for him to make it before, in which case he may hold the property exempt from sale.[1] But in Alabama a debtor may go into court and claim a sum of money equal to the value of the exempt property, and the claim of such exemption does not come too late when it is made before the money thus collected is paid over to the plaintiff in the attachment suit.[2]

The rule that the officer is charged with the knowledge of the exempt character of the specific property mentioned in the statute is extended, in Kansas, to charging him with knowledge of the quantity and value of the exempt property not specific. For it is said that a merchant tailor is absolutely entitled to an exemption in his stock in trade to the amount allowed by statute, and that this does not depend upon his selecting the same.[3]

Where the debtor is entitled to an exemption of either of two pieces of property, he is bound to make his selection at the time of the levy if he has knowledge of it, or he will be deemed to have waived the right.[4] And a selection once made is final. A debtor who has claimed a horse as exempt is estopped from afterwards claiming the exemption of oxen attached at the same time, though the horse was not his property.[5] If the debtor fails to make a selection within a reason-

his property and he wanted it to support his family," and it was held that these words constituted a sufficient claim that the property was exempt. Frick *v.* Mulholland, 48 Wis. 413.

1. Bittenger's Appeal, 76 Pa. St. 105; Strouse's Executor *v.* Becker, 44 Pa. St. 206; State *v.* Manly, 15 Ind. 8; Perkins *v.* Bragg, 29 Ind. 507.

It has been held in Ohio that the claim may as well be made after an order for the sale of the attached property as before. Close *v.* Sinclair, 38 Ohio St. 530.

2. Webb *v.* Edwards, 46 Ala. 17.

Replevin will always lie for exempt property. Carkin *v.* Babbitt, 58 N. H. 579; Harris *v.* Anstell, 2 Baxt. (Tenn.) 148.

3. Rice *v.* Nolan, 33 Kan. 28.

4. Buzzell *v.* Hardy, 58 N. H. 331.

5. Barney *v.* Keniston, 58 N. H. 168.

able time, the officer may make a selection for him, and he will be bound thereby.[1]

When the officer has not released the attached property, and it is desired to bring the attention of the court to the exempt character of the property attached, the claim may, in a justice's court, be made orally in the court in which the suit was brought.[2] And it is the duty of the court to order the release of any or all of the property which may be exempt as soon as the fact is brought to its knowledge and a lawful demand is made by the owner.[3] It must be released by order of the court issuing the writ. It can not be released upon the mere affidavit of the claimant.[4]

§ 75. **Waiver of claim of exemption.**—As a matter of primary importance it should be remembered that the exemption of wages from attachment and execution can not be waived.[5]

Failure to select what the debtor claims as exempt from execution or attachment is not, as a matter of law, a waiver.[6] But if the debtor, having had an opportunity to make a selection, fails to do so, he will be deemed to have waived his right to hold the property as exempt from attachment.[7] Where no part of provision is set apart for the family at the time of the levy, and no claim is made therefor during the pendency

1. Savage *v.* Davis, 134 Mass. 401.

In an action for taking exempt household goods it is for the plaintiff to prove that enough was not left to satisfy the statute. Gay *v.* Southworth, 113 Mass. 333.

And in an action for the wrongful attachment of a cow, the plaintiff must prove that it was his only cow, or, if he had two cows, that the officer attached the cow he selected. Howard *v.* Farr, 18 N. H. 457.

2. Bassett *v.* Inman, 7 Colo. 270.

3. Urquhart *v.* Smith, 5 Kan. 447.

4. State *v.* Sandford, 12 Neb. 425.

Demurrer will not bring the objection to the notice of the court. Mitchell *v.* Sutherland, 74 Me. 100. It should be done by motion to dissolve the attachment. See *post*.

5. See *post*, Vol. II, "Garnishment."

6. Copp *v.* Williams, 135 Mass. 401.

7. Colson *v.* Wilson, 58 Me. 416; Smith *v.* Chadwick, 51 Me. 515; Buzzell *v.* Hardy, 58 N. H. 331; Behymer *v.* Cook, 5 Colo. 395.

Under the Colorado statute no property is exempt against a claim for the purchase-money thereof. Behymer *v.* Cook, 5 Colo. 395. The same principle is applied in Illinois, but to real estate only. Wells *v.* Lilly, 86 Ill. 317; Howard *v.* Lakin, 88 Ill. 36.

of the proceedings, there is no exemption.[1] The debtor may waive his claim of exemption to the tools of his trade and his subsequent assent will make the attachment valid.[2] Being present at the sale and receiving the balance without objection, after the attaching creditor's demand is satisfied, is a waiver, and it is then too late to claim exemption, or to have an action against the officer for the seizure of property exempt by law. Such delay is unreasonable.[3] It is too late to claim an exemption even after judgment is rendered in the attachment suit.[4] The making of an assignment for the benefit of creditors by the defendant during the pendency of the attachment suit, in which he makes an exception of such property as he may lawfully hold exempt from execution, is not a waiver of his right to claim his exemption from the property attached.[5] But the fraudulent sale or fraudulent concealment of property for the purpose of hindering and delaying the creditor by preventing a sale of the property levied on is a bar to the debtor's right to claim an exemption.[6] Nor can such fraudulent vendor's right of exemption in the property sold be set up by the vendee in defense of the creditor's action for its recovery.[7] When the defendant gives a bond to the attaching officer and receives restitution of the property seized, it will be deemed to be a waiver of any right of exemption which he might have claimed.[8]

In Alabama the provision of the statute requires that when a waiver of exemption is made, the officer serving the writ must indorse the fact of the waiver upon it and the fact that

1. Clapp *v.* Thomas, 5 Allen (Mass.) 158; Nash *v.* Farrington, 4 Allen (Mass.) 157.

2. Hewes *v.* Parkman, 20 Pick. (Mass.) 90.

3. Grady *v.* Bramlett, 59 Cal. 105; Dow *v.* Cheney, 103 Mass. 181.

4. Perkins *v.* Bragg, 29 Ind. 507.

But it has been held in Ohio that the claim may as well be made after an order for the sale of the attached property as before. Close *v.* Sinclair, 38 Ohio St. 530.

5. Close *v.* Sinclair, 38 Ohio St. 530.

6. McCarthy's Appeal, 68 Pa. St. 217; Emerson *v.* Smith, 51 Pa. St. 90.

7. Tilton *v.* Sanborn, 59 N. H. 290.

That the debtor may claim his exemption in personal property fraudulently conveyed, see Naumburg *v.* Hyatt, 24 Fed. Rep. 898.

8. Wolf *v.* Cook, 40 Fed. Rep. 432.

the instrument on which the action is brought contains a waiver of exemption is not alone sufficient when the statute requires such indorsement on the writ.[1]

1. Fears *v.* Thompson, 82 Ala. 294, 2 So. Rep. 719.

CHAPTER V.

PARTIES TO THE ACTION.

1. *Parties Plaintiff.* 2. *Parties Defendant.*

§ 76. Plaintiffs—(a) Individuals, the matter of residence.
77. (b) Copartners, joint tenants, tenants in common *et al.*
78. (c) Corporations.
79. Defendants—(a) Individuals, generally.
80. (b) Joint debtors.
§ 81. (c) Partners.
82. (d) Tenants in common.
83. (e) Heirs and representatives of deceased debtors.
84. (f) Corporations.
85. (g) Persons other than debtors —Interveners.

§ 76. Plaintiffs—(a) Individuals, the matter of residence. —The only person who can sustain the action in any state is the person to whom the money is payable. The right to have process of attachment is an incident to the demand and not a personal privilege of the original creditor. It will pass by a general assignment, and the assignee may invoke the same in his own name.[1] And although a garnishment may not be legally sued out by another than the creditor in the name of such other person, yet if no objection is made and the garnishee appears and answers, and the alleged assignee takes judgment in his own name, such judgment will be held good; because the assignment passes an equitable title to the assignee, which will support the judgment.[2] It follows as a rule recognized in every state that a *creditor* may sue out a process of attachment when-

1. Whitman *v.* Keith, 18 Ohio St. 134; Conklin *v.* Harris, 5 Ala. 213.

Under a code which requires that a creditor, applying for a warrant for an attachment, shall produce "the bond, account or other evidences" of the debt—a creditor suing upon a contract to which he was not a party was required to produce the assignment upon which his claim is founded. Cumberland, etc., Co. *v.* Hoffman, etc., Co., 22 Md. 495.

2. McGill *v.* Bone, 21 Miss. (13 Sm. & M.) 592.

ever he shows proper grounds therefor,[1] but several creditors, having separate claims, can not unite in one suit to attach the property of an absent debtor.[2] Where one other than a creditor seeks to sue out an attachment he should procure the assent of the creditor; but a subsequent ratification will render valid an attachment made without such assent.[3]

The right to bring attachment is not solely an incident to the creditor in person, but may be maintained by his legal representative on a proper demand when proper grounds exist therefor.[4]

The matter of residence of the plaintiff will need consideration before a remedy is sought by attachment.

The Federal Constitution requires that each state shall extend to citizens of other states the same rights which it accords to its own citizens.[5] And aside from this it has been almost universally held in the state courts of last resort in which the question has been raised, that it is not necessary that the attachment plaintiff shall be a resident of the state in which the action is brought.[6] But in most cases in which the attention of the court has been drawn to the place in which the contract

1. As for grounds for attachment, see *post*, Chapter VI.

2. Corruthers *v.* Sargent, 20 W. Va. 351.

3. Bayley *v.* Bryant, 24 Pick. (Mass.) 198; Baird *v.* Williams, 19 Pick. (Mass.) 381.

In the absence of fraud, an attachment levied in a proceeding instituted by the debtors themselves in behalf of certain creditors, is valid when ratified by such creditors. The debtor has the right to prefer a creditor in this manner. First Nat. Bank *v.* Greenwood, 79 Wis. 269, 45 N. W. Rep. 810.

4. McCoy *v.* Swan, 2 Har. & J. (Md.) 344.

5. Constitution of United States, Art. IV, § 2.

6. Gibson *v.* Everett (S. C.), 19 S. E. Rep. 286; John Ray Clark Co. *v.* Toby Val. Supply Co., (Pa. Com. Pl.) 14 Pa. Co. Ct. R. 344; Woodley *v.* Shirley, Minor, (Ala.) 14; Hemingway *v.* Moore, 11 Ala. 645; Matter of Brown, 21 Wend. (N. Y.) 316; Graham *v.* Bradbury, 7 Mo. 281; McCready *v.* Kline, 6 Ired. (N. C.) L. 245; Exp. Caldwell, 5 Cow. (N. Y.) 293; Robbins *v.* Cooper, 6 Johns. (N. Y.) Ch. 186; Barrow *v.* Burbridge, 41 Miss. 622; Merchant *v.* Preston, 1 Lea (Tenn.) 280; Beasely *v.* Parker, 3 Tenn. Ch. 47; Hills *v.* Lazelle, 5 Sneed (Tenn.) 363; Ward *v.* McKenzie, 33 Tex. 297; Staples *v.* Fairchild, 3 Comst. (N. Y.) 41; Posey *v.* Buckner, 3 Mo. 604; McClerkin *v.* Sutton, 29 Ind. 407; Mitchell *v.* Snook, 72 Ill. 492. See, however, *In re* Marty, 3 Barb. (N. Y.) 229.

on which the non-resident plaintiff seeks to maintain attachment was made, it has been held that it must be an indebtedness within the state in which the suit is brought, or it will not support the action.[1]

In Maryland, where the statute provides especially that the action may be brought by a citizen of Maryland or some other of the United States, it has been held that a person may be a citizen of the United States, and not a citizen of any one state, and that an allegation that the plaintiff in attachment is a citizen of the United States is not sufficient; but that the proceedings must show that he is a citizen of some state of the United States.[2]

The cause of action on which one non-resident may have attachment against another non-resident must, of necessity, be such cause of action as would support attachment at a suit of a resident.[3]

A writ of attachment must be sued out in the name of *all* the parties in interest, and the parties in the declaration must conform to those mentioned in the affidavit and writ. If, however, one of the parties plaintiff be omitted in the writ and

1. *Ex parte* Schroeder, 6 Cow. (N. Y.) 603; Trabant *v.* Rummel, 14 Oregon 17. See *post*, § 17, "Contracts Made Outside of the State."

In an action brought in Kansas by one partner against his copartner to recover one-half of the net profits of the business before there has been a final accounting and a balance struck, it was held that the plaintiff can not attach the defendant's property on the ground of his non-residence unless the cause of action arose wholly within the limits of that state. Stone *v.* Boone, 24 Kan. 337.

The attachment under the New York code of procedure, unlike that of the revised statutes, is for the sole benefit of the attaching creditor; and a non-resident plaintiff is entitled to proceed by it as well as a resident. Ready *v.* Stewart, 1 Code R. N. S. (N. Y.) 297. Compare Furnham *v.* Walter, 13 How. (N. Y.) Pr. 348; Sheldon *v.* Blauvelt, 29 S. C. 453, 7 S. E. Rep. 593.

2. Yerby *v.* Lackland, 6 Har. & J. (Md.) 446; Shivers *v.* Wilson, 5 Har. & J. (Md.) 130. See also *post*, § 17.

3. Hazard *v.* Jordan, 12 Ala. 180.

Under the South Carolina statute, which allowed attachment only when "it shall appear that a cause of action exists against such defendant," it was proper to dismiss an attachment where the plaintiff, as an administrator, sued a resident of another state for personal property held by him in the capacity of guardian of plaintiff's intestate in such other state because an administrator has no right to sue for personalty of the deceased outside of the state in which he was appointed. Stevenson *v.* Dunlap, 33 S. C. 350.

affidavit, the court will allow them to be so amended as to include the proper parties.[1]

§ 77. (b) **Copartners—Joint tenants, tenants in common, et al.**—Attachment is not a remedy that is confined to any one class of individuals or to any particular form of action. Copartners, tenants in common and joint tenants can as well enforce their demands by means of an attachment as other individuals.[2] But it is not applicable where, from the nature of the business, it is impossible that the affiant can swear with certainty to the amount which may be found due on the final settlement between copartners.[3] It is said in Kansas that where the plaintiff can show a promise, express or implied, to pay the balance claimed, the cause of action does not arise out of the partnership business, but upon the promise made. However, he must show a balance struck, or quantity so agreed upon, that by simple computation from the balance sheet it can be ascertained.[4] And in Pennsylvania a balance struck between partners is a sufficient foundation for an attachment, without an express promise to pay it.[5] The action has been permitted in Georgia where a crop was raised on shares, and the landlord had taken possession of the whole. The tenant made out an account against the landlord, and enforced payment of it by attachment.[6] When there is a fixed sum due from one to the other, it is no longer a partnership matter, and when the plaintiff presents a case on which he can bring an action of *assumpsit* he should be granted an attachment.[7] In California one partner can not have attachment against the other on any matter connected with the partnership affairs.[8]

It is competent for one partner to institute an attachment

1. Shaw *v.* Brown, 42 Miss. 309.
2. Humphreys *v.* Matthews, 11 Ill. 471.
3. Ackroyd *v.* Ackroyd, 11 Abb. (N. Y.) Pr. 345, 20 How. (N. Y.) Pr. 93; Ketchum *v.* Ketchum, 1 Abb. (N. Y.) Pr. N. S. 157; Brinegar *v.* Griffin, 2 La. Ann. 154; Johnson *v.* Short, 2 La. Ann. 277.
4. Treadway *v.* Ryan, 3 Kan. 437.
5. Knerr *v.* Hoffman, 65 Pa. St. 126.
6. Holloway *v.* Brinklin, 42 Ga. 226.
7. Humphreys *v.* Matthews, 11 Ill. 471.
8. Wheeler *v.* Farmer, 38 Cal. 203.

proceeding for the firm, the suit being for a partnership demand.[1]

§ 78. (c) **Corporations.**—Corporations being regarded as fictitious individuals, either a foreign corporation or a domestic corporation is entitled to sue under the attachment laws for the same cause of action and on the same grounds that would entitle a natural person to the writ.[2]

The United States has sued out an attachment in the courts of Louisiana notwithstanding the fact that the attached property was in the possession of a United States officer, and notwithstanding the fact that the defendant was a resident of the United States and could have been cited where he resided, and notwithstanding the fact that the imported goods had been sold before the payment of the duties for the collection of which the attachment was brought.[3] An attachment may be issued in aid of a common law information prosecuted by the United States under the practice which has prevailed in the district court for the southern district of New York.[4] When the United States sues by attachment it need not give a bond.[5]

The state has the same right to sue out process of garnishment as any other creditor.[6]

All municipal corporations coming within the rule, a board of supervisors can sue in attachment in behalf of the county.[7]

1. McCluny *v.* Jackson, 6 Gratt. (Va.) 96.

And when the bond required is signed by both partners, each partner recognizes the proceedings, and the judgment or costs, should the plaintiffs be cast, would be against the firm. McCluny *v.* Jackson, 6 Gratt. (Va.) 96.

2. Union Bank *v.* United States Bank, 4 Humph. (Tenn.) 369.

A corporation created by the laws of this state may have a foreign attachment against an absent or nonresident debtor, and it will be authorized by the affidavit of the attorney of the corporation. Trenton Bank Co. *v.* Haverstick, 11 N. J. L. (6 Hals.) 171.

The right of Alabama banks to sue out an attachmont in the county of their location was a privilege, and did not abridge the powers they previously possessed to sue out an attachment in the county where the defendant resided. Pearson *v.* Gayle, 11 Ala. 278.

3. United States *v.* Murdock, 18 La. Ann. 305.

4. United States *v.* Stevenson, 1 Abb. U. S. 495.

5. Rev. Stat. D. C. 1001; United States *v.* Ottman, 3 McArthur (D. C.) 73.

6. People *v.* Johnson, 14 Ill. 342.

7. State *v.* Fortinberry, 54 Miss. 316.

§ 79. **Defendants—(a) Individuals, Generally.**—As already shown,[1] the most general proposition that can be laid down regarding who may sue in attachment is that a creditor may sue; likewise the most general proposition that can be stated regarding who may be sued is that no person can be a defendant in an action of attachment unless she be a *debtor* of the plaintiff. Whether the indebtedness must be one that is due and owing at the time of the commencement of the action, or one that may thereafter accrue, depends wholly upon the controlling statute. There can be no general rule stated in regard thereto.[2]

The non-residence of a defendant is a "ground" for attachment and will be considered under the subject of "Grounds for Attachment" against non-residents, together with the grounds for bringing attachment against resident debtors.[3]

As to bringing suits of attachment against female debtors it may be said that in most states no distinction is made between males and females. A wife's separate estate has been subjected in a suit against herself and husband, both non-residents, for the satisfaction of a debt contracted by her before marriage.[4] And again an attachment was not sustained against a wife and husband sued as copartners, where the cause of action accrued during coverture.[5]

The property of "soldiers in actual military service" is exempt from attachment,[6] but such exemption does not extend to persons in the naval service.[7]

The fact that the debtor is a lunatic constitutes no reason why his estate should not be proceeded against by attachment; nor is it necessary that he should appear and be defended by his next friend.[8]

The effects or debts of a surety who has removed from the

1. *Ante*, § 76.
2. See *ante*, § 20.
3. *Post*, § 86, *et seq.*
4. Crocker *v.* Clements, 23 Ala. 296.
5. Mayer *v.* Soyster, 30 Md. 402.
6. Haynes *v.* Powell, 69 Tenn. 347; Abrams *v.* Pender, Busby (N. C.) L. 260.
7. Abrahams *v.* Bartlet, 18 Iowa 513. See "Residence," as contemplated by the Attachment Laws, *post*, § 90.
8. Weber *v.* Weitling, 15 N. J. L. 441.

country, leaving the principal within it, may be attached by the obligee.[1]

The mere pendency of a petition in insolvency, for the discharge of an insolvent debtor, does not debar creditors from bringing attachment for the collection of their claims.[2]

The proceeding in the commencement of suits when the first name of the defendant is unknown is generally understood and needs not to be mentioned here, but where the first name of the defendant appears on the face of the proceedings to be fictitious, an attachment will be absolutely void and the officer executing it will be liable with the creditor, although the party intended, be the owner of the property seized.[3] A public officer or agent can not be made a defendant in a foreign attachment.[4] And, in order to attach property held by a resident officer under legal process, he must be proceeded against as a garnishee.[5] An agent can not be subject to foreign attachment for wages due from his principal to the defendant.[6]

§ 80. (b) **Joint debtors.**—The lines of demarkation have not been strictly drawn regarding the liabilities of individuals having a community of interest in the property sought to be attached; that is to say, the logical distinction between joint debtors, copartners and tenants in common has not been strictly observed. We have made an effort to classify them, but with only partial success, arranging them hereinafter in the order named. No confusion need, however, arise in the mind of the practitioner, because the same general principles that apply to one class in a given locality will apply to all.

Process of attachment is only justifiable when it is apparent that the creditor is likely to lose his debt or be seriously delayed through the fraud of the debtor; and in case of joint debtors, the facts justifying the attachments must generally apply to all, otherwise those to whom the facts do not apply

1. Loop *v.* Summers, 3 Rand. (Va.) 511.

2. Mowry *v.* White 21 Wis. 417.

3. Patrick *v.* Solinger, 9 Daly (N. Y.) 149.

4. Spalding *v.* Imlay, 1 Root (Conn.) 551; Stillman *v.* Isham, 11 Conn. 124.

5. Locke *v.* Butler, 19 Ohio State 587. See as to garnishment, *post*, Vol. II.

6. Casey *v.* Davis, 100 Mass. 124. See as to garnishment, *post*, Vol. II.

must be insolvent.[1] It has been said that a creditor of joint debtors may secure his claim by attaching the property of either or both,[2] but it is unusual for the courts to permit an attachment of the property of both joint debtors on a cause for attachment existing against only one.[3] The action will generally be permitted against the property of one of two joint contractors on the ground of his non-residence, although the other may be a resident of the state.[4] And the interest of a joint obligee may be attached for his *individual* debt in the hands of a joint obligor.[5] And where the action is joint and several, an attachment may be sustained against one alone, for good cause shown.[6] In Connecticut the interest of one joint tenant may be taken in attachment, and the whole property removed, notwithstanding the rights of the other joint tenant, under an agreement between the two, may be thereby impaired.[7] But in Wisconsin the rule is stated to be, that where a cause exists for an attachment against the property of one defendant in an action, the writ may issue against *his* property, though no cause for issuing it exists as to his codefendant. And upon a writ of attachment against the property of one of the defendants in an action, any interest which *he* may have in any property with his codefendants or others, as joint owner, may be seized, and the sheriff under such seizure may take and retain possession of such property.[8] But where only one of several debtors declares a fraudulent intent, an attachment of the property of *all* would open the door of fraud as against the codebtor.[9] If one of several joint makers in South Caro-

1. Ogilvie *v.* Washburne, 4 Greene (Iowa) 548; Courrier *v.* Cleghorn, 3 Greene (Iowa) 523; Pratt *v.* Pratt, 2 Chand (Wis.) 48; Dunn's Trustee *v.* McAlpin, 90 Ky. 78, 13 S. W. Rep. 363; Francis *v.* Burnett, 84 Ky. 23.

2. Marion *v.* Faxon, 20 Conn. 486; Greene *v.* Pyne, 1 Ala. 235; Austin *v.* Burgett, 10 Iowa 302.

3. See *ante*, § 48.

In Ohio a foreign attachment can not be sustained against one of several joint contractors. Cowdin *v.* Hurford, 4 Ohio 132.

4. Searcy *v.* Platte County, 10 Mo. 269; Matter of Griswold, 13 Barb. (N. Y.) 412.

5. Miller *v.* Richardson, 1 Mo. 310.

6. Crittendon *v.* Hobbs, 9 Iowa 417.

7. Remington *v.* Cady, 10 Conn. 44.

8. Bank of Northwest *v.* Taylor, 16 Wis. 609.

9. Pratt *v.* Pratt, 2 Chand (Wis.) 48.

lina is about to remove from the state a creditor may sue out a joint writ and serve the defendants not about to remove with a copy thereof after the cause of action has accrued; but such service upon the defendant not about to remove when the cause of action has not matured is premature and gives ground for a non-suit.[1]

One who has bought personal property or undivided parts of chattels, with an option reserved to return or reconvey, or to pay for them within a term, is liable in an action of foreign attachment, if service be had before the expiration of the term, and before his election, in the same manner he would be if he were bound to return the chattels in specie.[2]

§ 81. (c) **Partners.**—When we seek to determine who shall be made parties defendant in an attachment suit where a co-partnership exists, four questions present themselves for consideration. (1) Is the debt a debt of the firm, or is it only the debt of an individual copartner? (2) If it is a debt of the firm, have the grounds for attachment been given by every member of the firm, or only by one of the copartners? (3) If it is a debt of the firm, and ground for attachment has not been given by every member of the firm, can attachment be sustained against the firm or only against the individual copartners giving cause for it? And (4) if it is the individual debt of one copartner, can an attachment be levied upon the copartnership property?

There is no doubt that if all the partners have rendered themselves liable, attachment will lie against all, for a firm debt.[3] It is also true that if the debt is that of an individual copartner, he alone should be made a defendant in the suit; but whether or not his interests in the assets of the firm can be seized to satisfy such indebtedness is a matter that will receive consideration in its proper place when we come to treat of "What Property or Interest may be Reached."[4] How far partnership

1. Josey *v.* Dixon, 12 Rich. (S. C.) 378.
2. Smith *v.* Cahoon, 37 Me. 281.
3. Curtis *v.* Hollingshead, 14 N. J. L. (2 Green) 402; Hall *v.* Richardson, (N. H.) 20 Atl. Rep. 978.
4. *Ante*, § 28.

property may be made submissive to a writ of attachment issued for a cause given by only one member of a firm on an indebtedness of the firm will also be considered in that connection, so far as relevant, and further under the head of "Grounds for Attachment."[1]

§ 82. (d) **Tenants in common.**—The undivided interest of a tenant in common may be levied upon and sold under an attachment; and this, without making the cotenants parties.[2] But the sheriff can sell only the undivided moiety or interest of the debtor, and the purchaser thereof becomes a tenant in common with the other cotenant. Such other cotenant is barred from maintaining trespass or trover therefor against the plaintiff in attachment because the tenancy in common has not been destroyed by the sale.[3]

§ 83. (e) **Heirs and representatives of deceased debtors.**—A writ of foreign attachment can not generally issue at suit of the creditor of a deceased debtor, against the heirs and representatives of such debtor.[4] But when an attachment writ is served, the plaintiff acquires a right in the property not to be defeated by the death of the debtor, if the action survives and the courts have power to continue it and the action is revived against his representative.[5] The pending attachment is a lien upon real property and when levied upon the real estate of a

1. *Post*, § 86, *et seq.*

2. Curry *v.* Hale, 15 W. Va. 867; Buddington *v.* Stewart, 14 Conn. 404.

One-half only of the undivided chattels can be attached in a suit against one of two tenants in common. Ladd *v.* Hill, 4 Vt. 164; Melville *v.* Brown, 15 Mass. 82; Peck *v.* Fisher, 7 Cush. (Mass.) 386.

3. Mersereau *v.* Norton, 15 Johns. (N. Y.) 179; Sibley *v.* Fernie, 22 La. Ann. 163.

4. Peacock *v.* Wildes, 8 N. J. L. (3 Hals.) 179; Patterson *v.* McLaughlin, 1 Cranch C. Ct. (D. C.) 352; Redfern *v.* Rummey, 1 Cranch C. Ct. (D. C.) 300; Henderson *v.* Henderson, 5 Cranch C. Ct. (D. C.) 469.

Nor will an attachment lie to charge the effects of a deceased foreign debtor in the hands of a resident defendant; because there is no longer any "absent debtor" within the meaning of the statute. Redfern *v.* Rummey, 1 Cranch C. Ct. (D. C.) 300.

5. Thatcher *v.* Bancroft, 15 Abb. (N. Y.) Pr. 243; Rogers *v.* Burbridge, 5 Tex. Civ. App. 67, 24 S.W. Rep. 500; Davis *v.* Shapleigh, 19 Ill. 386; Dow *v.* Blake, 148 Ill. 76, 35 N. E. Rep. 761, 46 Ill. App. 329.

debtor, who dies before judgment, his heirs take subject to it and must be made parties to the proceeding to subject it. They may then deny that the creditor has exhausted the personal estate of the deceased debtor.[1] However the creditor of a deceased debtor in Virginia may sue out a foreign attachment against the heirs who reside out of the state and subject lands or its profits in the state which belong to the deceased debtor. But if the lands have been sold by the heirs under a decree of court and the proceeds paid to a commissioner, he should be made a party as commissioner and by indorsement of the process restrained from disposing of the proceeds.[2] A creditor of one of the heirs of a decedent may attach his debtor's undivided interest in the real estate of decedent, and when such attachment is pending at the time of probate proceedings such attaching creditor has a right to appeal from the decree of probate.[3]

An action of attachment against an executor or an administrator is generally inapplicable for the purpose of compelling the settlement of debts contracted by the decedent where the executor or administrator is not chargeable with any breach of duty other than a failure to pay the debt.[4] But an executor or administrator who has become personally liable may be proceeded against by attachment.[5] And where the distributive share has been ascertained by a settlement of the administration account, and such distributive share is still in the hands of the administrator or executor, it is liable to attachment, but the administrator may then require a refunding bond from the attaching creditor to meet outstanding claims.[6]

1. Pierkins *v.* Norvell, 6 Humph. (Tenn.) 151; Snell *v.* Allen, 1 Swan (Tenn.) 208.

2. Carrington *v.* Didier, 8 Gratt. (Va.) 260.

3. Smith *v.* Bradstreet, 16 Pick. (Mass.) 264; McClellan *v.* Solomon, 23 Fla. 437, 2 So. Rep. 825.

4. Metcalf *v.* Clark, 41 Barb. (N. Y.) 45; Smith *v.* Riley, 32 Ga. 356; Hurds' Case, 9 Wend. (N. Y.) 465; Taliferro *v.* Lane, 23 Ala. 369; Conway *v.* Armington, 11 R. I. 116; M'Comb *v.* Dunch, 2 Dall. 73; Pringle *v.* Black, 2 Dall. 97; Weyman *v.* Murdock, Harp. (S. C.) 125; Williamson *v.* Beck, 1 Leg. Gaz. Rep. (Pa.) 200, 8 Phila. 269.

5. Matter of Galloway, 21 Wend. (N. Y.) 32.

6. McCreary *v.* Topper, 10 Pa. St. 419; Fitchett *v.* Dolbee, 3 Harr. (Del.)

It has been in some instances, however, provided that an attachment may issue against an executor or an administrator who is actually removing, or about to remove, the property of the deceased out of the county.[1]

An attachment against a foreign executor or administrator of a deceased non-resident debtor is permissible, but it must appear that he was a non-resident at the time of his death. And when such attachment is sued out against a non-resident debtor himself while living, the suit can not be revived by *sci. fa.* against his foreign executor or administrator, because it does not follow that he was a non-resident at the time of his death.[2] An attachment in favor of a resident citizen against the executor or administrator of a non-resident debtor must be levied on property which has not been reduced into possession by the foreign executor so as to be assets.[3]

Where attachment proceedings have been improperly had against persons claiming only by right of representation, and the debtors were therein named as trustees, as executors, etc., these additions will be regarded, after lapse of time and acquiescence, as mere words of description, in order to support the legality of the proceedings.[4] But, although executors can not be held liable in attachment for a demand against their decedent, they may be held in an attachment suit against "—— & ——, executors" for a debt which they have contracted while doing business under such name.[5] The service of an attach-

267; Brady *v.* Grant, 11 Pa. St. 361; Davis *v.* Davis, 2 Cush. (Mass.) 111.

A contingent remainder is not within the Virginia code, allowing an attachment against "estates or debts" in certain instances. Young *v.* Young, 89 Va. 675, 17 S. E. Rep. 470.

1. The affidavit in such case must allege that he is actually removing the property, or about to remove it. The fact that the executor is himself actually removing is no ground for attachment. Halloway *v.* Chiles, 40 Ga. 346.

2. Branch Bank *v.* McDonald, 22 Ala. 474.

3. Loomis *v.* Allen, 7 Ala. 706.

Where such an attachment is improperly sued out, it must be abated by plea, and can not be taken advantage of after judgment by default. Loomis *v.* Allen, 7 Ala. 706.

The proper judgment in such a case is the condemnation of the property levied on for the satisfaction of the debt, and, if replevied by the executor, then against him personally, to be discharged by the delivery of the property. Loomis *v.* Allen, 7 Ala. 706.

4. Jackson *v.* Walsworth, 1 Johns. (N. Y.) Cas. 372.

5. Wickham *v.* Stern, 9 N. Y. S. 803, 18 Civ. Proc. R. 63.

ment of a legacy upon one of two executors, before either has qualified, will create a lien upon the legacy.[1]

§ 84. (f) **Corporations.**[2]—The property of private corporations is generally subject to foreign attachment laws upon the same grounds and causes of action as that of individuals.[3] A corporation is liable to be sued like a natural person in transitory actions in any state where service of process can be had.[4] The resident agent of a foreign corporation may generally be served with like effect as if the company existed in the state.[5] It must be remembered, however, that stockholders are distinct persons from the corporation, and legal proceedings against them can not reach it or its assets. Hence, if an attachment is sued out in a proceeding in which the stockholders are made parties but the corporation not, and is levied upon the effects of the corporation, no lien is acquired by virtue of the levy of said attachment.[6]

1. Sandidge *v.* Graves, 1 Patt. & H. (Va.) 101.

2. As to attachment of non-resident corporations, see "Grounds for Attachment—Non-residence," *post*, § 90.

3. South Carolina R. Co. *v.* McDonald, 5 Ga. 531; St. Louis Perpetual Ins. Co. *v.* Cohn, 9 Mo. 417; Cook *v.* State Nat. Bank of Boston, 50 Barb. (N. Y.) 339; Union Bank *v.* United States Bank, 4 Humph. (Tenn.) 369; Bushel *v.* Commonwealth Ins. Co., 15 Serg. & R. (Pa.) 173; Bank of U. S. *v.* Merchants' Bank of Baltimore, 1 Robb. (Va.) 573; Quinton *v.* Railroad Co., 1 Pa. Law Jour. Rep. 8; (but see Monongahela Navigation Co. *v.* Ledlie, 1 Pa. Law Jour. Rep. 498); Reed *v.* Penrose, 2 Grant (Pa.) Cas. 472; Taylor *v.* Burlington, etc., R. R. Co., 5 Iowa 114; Burton *v.* Warren, 11 Iowa 166; Knox *v.* Protection Ins. Co., 9 Conn. 430; Barbour *v.* Paige Hotel Co., 2 Appealed Cases (D. C.) 174.

And this may be true even though the attachment law be passed after the cause of action arose. Coosa River Steamboat Co. *v.* Barclay, 30 Ala. 120.

4. N. O. J. & G. N. R. R. Co. *v.* Wallace, 50 Miss. 244.

5. Morton *v.* Mutual Life Ins. Co., 105 Mass. 141.

But the residence of the agent does not affect the non-resident character of the corporation. See below.

The affidavit for attachment should state that the named defendant is a corporation. For, if it be assumed to be a copartnership, service as such by reading to the individuals named will not be good. Hinman *v.* Andrews Opera Co., 49 Ill. App. 135.

6. Lillard *v.* Porter, 2 Head. (Tenn.) 177.

Assignees of an insolvent corporation may maintain an attachment against non-resident subscribers of stock for sums due the corporation on such subscriptions, and no prior decree of a court of chancery nor assessment by the board of directors is necessary. Kohler *v.* Agassiz, 33, Pac. Rep. 741, 99 Cal. 9.

Much litigation has been had upon the question as to whether or not a corporation is a resident corporation in the state where it transacts business. On this point it is said that a corporation has no existence out of the state where it is created, and that while it is everywhere recognized as such corporation and its powers to contract respected,[1] yet it only exercises its corporate franchises by the comity of the state where it is doing business. It does not enter such state as a "citizen of another state," within the meaning of the constitution of the United States, according to such incoming citizen all the rights and privileges of citizens of such state.[2] And the statutes referring to foreign corporations do not refer to the residence of the incorporators, but to the place where the charter is granted.[3] A foreign corporation is one owing its corporate existence to the act of another state, and when it exists as one corporation, under the acts of two states, having but one capital stock and one set of officers, it is not suable as a foreign corporation in either of such states.[4]

Where by the comity of a state a corporation is allowed to transact business and to sue and be sued, it necessarily possesses authority to perform by its agents all acts necessary in conducting such suits.[5] And where such foreign corporation is allowed to be sued by service on its agent, the statute permitting the same should be construed as authorizing a general judgment against the corporation upon the agent's acknowledgment of service of process in attachment.[6] The enactment of a statute which authorizes an attachment against a foreign corporation which is doing business within the state does not affect the previous right to sue out an attachment against a corporation not doing business in the state.[7] In

1. Bank of Augusta *v.* Earl, 13 Peters (U. S.) 519; Gill *v.* Kentucky, etc., Co., 70 Ky. 635.

2. Liverpool Ins. Co. *v.* Moss, 10 Wall. (U. S.) 566.

3. Harley *v.* Charleston S. P. Co., 2 Miles (Pa.) 249.

4. Sprague *v.* Hartford, etc., Co., 5 R. I. 233. See Farnum *v.* Blackstone Canal Co., 1 Sumner (U. S.) 47.

5. Planters' and M. Bank *v.* Andrews, 8 Porter (Ala.) 404.

6. Atlantic, etc., R. R. Co. v. Jacksonville, etc., R. R. Co., 51 Ga. 458.

7. Wilson *v.* Danforth, 47 Ga. 676. For decisions holding that attach-

Massachusetts it is said that a foreign corporation can be sued only by attachment, unless jurisdiction is otherwise expressly given by a statute.[1]

When a national bank holds its corporate existence in another state than the one in which it does business, it is liable in an action of foreign attachment in the state where the business is done.[2] A statute authorizing actions to be brought in attachment against corporations "created by or under laws of any other state, government, or country" is intended to include all corporations formed under the laws of any other government than the one enacting the law, and plainly includes the government of the United States, consequently under such a statute a national bank may be made a defendant in an attachment although it was organized and is located within the state.[3] And although such bank may have committed an act of insolvency before the institution of the suit and its charter afterwards dissolved and its franchise forfeited by decree of the United States district court and a receiver properly appointed to take charge of its assets under act of congress, an attachment suit will not be dissolved, dismissed or abated, or the levy quashed because thereof.[4]

A foreign attachment will lie in a circuit court of the United States against the effects of an inhabitant of a foreign country,[5] but it can not be begun in a circuit court of the United

ment will not lie against corporations because of the particular statute of the state in which they do business, see Vogle *v.* New Granada, etc., Co., 1 Houst. (Del.) 294; Phillipsbury Bank *v.* Lackawanna R. R. Co., 27 N. J. L. (3 Dutch.) 206; State *v.* N. C. R. Co., 18 Md. 193; Martin *v.* Mobile & O. R. Co., 7 Bush 116, 70 Ky. 116; M'Queen *v.* Middleton Mfg. Co., 16 Johns. (N. Y.) 5.

1. Andrews *v.* Michigan Central R. R. Co., 99 Mass. 534. See further as to non-resident corporations, *post*, § 90.

2. Davis *v.* Cook, 9 Nev. 134.

3. Bowen *v.* First Nat. Bank of Medina, 34 How. (N. Y.) Pr. 408; Cooke *v.* State Nat. Bank, 50 Barb. (N. Y.) 339.

4. First Nat. Bank *v.* Colby, 46 Ala. 435.

National banks come within the provision of the statute that attachments can not be issued before final judgment has been entered. Central Nat. Bank *v.* Richland Nat. Bank, 52 How. (N. Y.) Pr. 136; Rhoner *v.* First Nat. Bank, 14 Hun 126.

5. Fisher *v.* Conseque, 2 Browna (Pa.) Appx. 28.

States against the effects of an inhabitant of the United States,[1] although it has been said that a circuit court is a court of the commonwealth within which it is located.[2] The action of foreign attachment against an inhabitant of the United States must be begun in a state court. Many corporation cases begun in a state court are removed therefrom to a United States court within that state, for the advantages to be therein derived. And this may be done in all cases by a foreign corporation defendant, unless there is a state statute having the force to compel such foreign corporation to submit to the jurisdiction of the state court while it does business in such state.[3] Where, however, service has been had by publication of notice, and such defendant has removed the cause to the Federal court, such defendant can not thereafter be heard to object to the service, and the attachment will hold by virtue of the jurisdiction acquired in the state court.[4] Nor can it object to the jurisdiction when it has pleaded in the court below.[5]

A municipal corporation is not generally liable to attachment.[6] Therefore, a county is not liable to foreign attachment.[7] Nor is a town, divided into school districts, liable to garnishment for a teacher's wages.[8] But the Iowa code declares that a municipal corporation is liable, like any other debtor, to be sum-

1. Hollingsworth *v.* Adams, 2 Dall. (Pa.) 396.

2. *Ex parte* Schollenberger, 86 U. S. 369.

3. Hobbs *v.* Manhattan Ins. Co., 56 Me. 417; Hatch *v.* Chicago Ry. Co., 6 Blatch. (U. S.) 105; Morton *v.* Mutual Life Ins. Co., 105 Mass. 141; Stevens *v.* Phœnix Ins. Co., 41 N. Y. 149.

On the question of compelling a submission to the state courts, is a conflict of state and national laws, a discussion of which is beyond the scope of this work. The reader is referred to some work on federal procedure.

4. Bliven *v.* New England Screw Co., 3 Blatch. (U. S.) 111; Barney *v.* Globe Bank, 5 Blatch. (U. S.) 107; Hobbs *v.* Manhattan Ins. Co., 56 Me. 417; Morton *v.* Mutual Life Ins. Co., 105 Mass. 141.

5. Orleans, etc., *v.* Wallace, 50 Miss. 244.

6. Merwin *v.* Chicago, 45 Ill. 133; Mayer, etc., *v.* Horton, 38 N. J. L. 88; People *v.* Mayor of Omaha, 2 Neb. 166; McDougal *v.* Supervisors, 4 Minn. 184; Jenks *v.* Osceola Township, 45 Iowa 554; Memphis *v.* Laski, 9 Heisk. (Tenn.) 511; Buffham *v.* Racine, 26 Wis. 449.

7. Ward *v.* County of Hartford, 12 Conn. 404.

8. Spencer *v.* School District No. 17, 11 R. I. 537.

moned as a garnishee.[1] Since a state can not be sued in its own courts without it consents thereto, money in the hands of a state treasurer, though due from a non-resident debtor, can not be attached at suit of a creditor.[2]

§ 85. (g) Persons other than the debtor, interveners.—It may happen that some person other than the defendant in the action of attachment may claim the property seized, or may at least have some interest therein which he desires to protect. While it has been said that none but a party to a suit can move to set aside an attachment,[3] yet such claimant is in most states permitted to intervene, and at least move for a dismissal of the writ. Such person is termed the intervener. Any person claiming may move to dismiss, although he is not a party to the original suit.[4] In some states his relief is limited to a dismissal of the attachment from such part of the property seized as he may claim.[5] In others it is held that the claimant can only make such objections to the proceedings as he might do if attacking them in an independent and collateral action. He may not, like a defendant, avail himself of such errors as are sufficient for reversal. Neither does he admit the regularity of the proceedings by his appearance.[6] And in others again it is held that he may not only move to quash the attachment, but may have a jury and controvert the facts stated in the affidavit;[7] and that when he has established his claim he is entitled to recover it by judgment.[8]

It seems that where the disclosure of the garnishee in attachment shows that the fund is claimed by another than the

1. Wales *v.* Muscatine, 4 Iowa 302. Compare, Clapp *v.* Walker, 25 Iowa 315. See as to garnishment, Vol. II.

2. Lodor *v.* Baker, 39 N. J. L. 49.

3. Copeland *v.* Piedmont, etc., Ins. Co., 17 S. C. 116.

4. Mayberry *v.* Steagall, 51 Tex. 351.

5. Trow's Printing, etc., Co. *v.* Hart, 85 N. Y. 500.

6. Peters *v.* Dickey, Texas L. R., Nov., 1884; Winslow *v.* Bracken, 57 Ala. 368.

7. Capehart *v.* Dowery, 10 W. Va. 130.

8. Borden *v.* Noble, 26 Kan. 599.

When property has been attached and a third person claims a right to have his debt satisfied out of the attached property, he can either defend in his own name or in the name of the debtor. M'Cluny *v.* Jackson, 6 Gratt. (Va.) 96.

principal defendant, the plaintiff must take steps to make the claimant a party to the suit; for otherwise there can be no binding adjudication of such party's claim.[1]

The fact that a fund held in trust by a trustee has been by him deposited in a bank and mixed with other moneys in his name, does not change the character of the fund and the equitable owner may still intervene and assert his rights.[2]

Where an intervener's claim is sustained, judgment must be given in his favor against the plaintiff, for costs.[3] But where after proper notice to such party he fails to appear and defend, judgment must be in favor of the plaintiff against the garnishee for the amount admitted in his answer to be in his hands.[4] Neither will the right of such party be cut off by any act equivalent to the consent of the garnishee. He can not waive the rights of other persons.[5]

Where such intervener is a judgment creditor and the attachment proceedings have been dismissed on his motion, and the case is taken up by the attaching creditor for review, such judgment creditor on whose motion the attachment was dismissed, becomes a necessary party.[6]

1. Look *v.* Brackett, 74 Me. 347. See also Vol. II, "Garnishment."

In an attachment of land in Texas, persons claiming homestead rights therein may be made parties thereto. Canadian and American Mortgage Trust Co. *v.* Kyser, (Tex. Civ. App.) 27 S. W. Rep. 280.

2. Morrill *v.* Raymond, 28 Kan. 415.

3. Kirby *v.* Corning, 54 Wis. 599.

4. Saller *v.* Ins. Co., 62 Ala. 221. See also Fish *v.* Keeney, 91 Pa. St. 138; Chesapeake and Ohio R. R. Co. *v.* Paine, 29 Gratt. (Va.) 502.

5. Blake *v.* Hubbard, 45 Mich. 1.

6. Ferguson *v.* Smith, 10 Kan. 394.

CHAPTER VI.

GROUNDS FOR ATTACHMENT.

§ 86. Generally.
87. "Absent and absconding" debtors.
(a) What comprehended by the term *"absent."*
88. (b) Who is an absconding debtor.
89. (c) Who is a concealed debtor.
90. "Non-resident" debtors.
(a) "Residence" as contemplated by the attachment laws.
91. (b) Effect of temporary absence.
92. (c) Effect of an intention to return.
93. (d) Effect of an intention to remove.
94. (e) Effect of leaving family and going abroad.
95. (f) Effect of the act of removing family and goods.
96. (g) Acquiring residence elsewhere.
97. (h) "Non-resident," although domicile in the state.
98. (i) Effect of doing business in the state while residing elsewhere.
99. (j) Effect of doing business out of the state.
100. When attachment will lie against one as a non-resident.
101. Oath of affiant not conclusive of debtor's non-residence.
§ 102. Effect of defendant's residing in another part of the state when suit is begun.
103. Effect of personal service upon the defendant within the state.
104. Effect of non-residence of part of a firm and residence of the others.
105. Non-resident or foreign corporations.
106. "Removal of property" and same "with intent," or "to the injury of."
107. (a) Effect of an honest purpose.
108. (b) Traverse of the allegation.
109. (c) Fraudulent intent of one member of a copartnership.
110. (d) Belief of the affiant not sufficient.
111. Fraudulent disposal, secretion, or conveyancy of property.
112. (a) Acts that have been held sufficiently fraudulent within the attachment law.
113. (b) Acts that have been held not sufficiently fraudulent within the attachment law.
114. (c) When fraud will or will not be presumed.
115. (d) How the fraud established.
116. (e) The burden of proof.

§ 117. (f) Alienation or delivery to wife or child.
118. (g) Fraudulent assignment or transfer of property.
119. (h) Effect of threats to convey, assign, etc.
120. (i) Preference of creditors not alone sufficient fraud.
121. (j) Confession of judgment not alone sufficient fraud.
§ 122. (k) Giving a mortgage is not alone sufficient fraud.
123. (l) Fraudulent secretion of money and property—Fraudulent statement regarding finances.
124. (m) Fraudulent disposition of partnership property.
125. Fraud in contracting the debt.
126. (a) Debt criminally contracted.

§ 86. Generally.—Attachment is merely an auxiliary writ to secure a fund to be applied to the satisfaction of the claim of the plaintiff, provided he shall be able to substantiate it in the main action. It is a universal requirement of the statutes of all the states that, before the plaintiff can have the benefit of this auxiliary writ, he must show by affidavit that the defendant has given rise to at least one of certain specified conditions of things which are wholly independent of the indebtedness itself. These conditions or circumstances, the concurrence of which, with the "money demand," will permit the "creditor" to subject his "debtor's" effects in this summary way to the satisfaction thereof, are called the "grounds for attachment."

The remedy by attachment being an extraordinary remedy may not be resorted to except in cases clearly within the provisions of the statute.[1] In order to protect the plaintiff in suing out an attachment, it is necessary that he should have reasonable grounds for the belief of the allegations of his affidavit or petition.[2] And in order to sustain the attachment, if a motion is made to quash or discharge it, supported by affidavit denying the grounds alleged for the suing out thereof, the plaintiff will have to prove the actual existence of such ground by proper evidence.[3] The attachment itself is justified,

1. Pierse *v.* Smith, 1 Minn. 82; Walker *v.* Hagerty, 20 Neb. 482; Bundrem *v.* Denn, 25 Kan. 430; Excelsior Fork Co., *v.* Lukens, 38 Ind. 438.

2. Carey *v.* Gunnison, 51 Ia. 202; Dogan *v.* Cole, 63 Miss. 153; Kennedy *v.* Chumar, 26 N. J. L. (2 Dutch.) 305.

3. Seville *v.* Wagner, 46 Ohio St. 52, 18 N. E. Rep. 430; Capehart *v.* Dowery, 10 W. Va. 130.

Whether there is any evidence tending to sustain the attachment is a question of law which is to be determined by the court. Seville *v.* Wag-

not by the belief of the affiant in the existence of a fact, but by the fact of its existence.[1] The validity of the attachment must be determined by the facts which existed at the date when it was issued.[2] The law does not entitle a party to an attachment simply because his claim is just. Some one, at least, of the causes laid down in the statute must exist, or the suing out of the attachment is wrongful.[3] The fact that the security for the payment of the demand has become valueless from lapse of time will not entitle the creditor to such process,[4] nor will the mere threat of the debtor to make a preferential assignment, because it is not necessarily a threat to make a fraudulent assignment.[5]

The principal grounds for resorting to this harsh and extraordinary remedy are much the same everywhere. And the statement of the adjudications thereon may generally be applied in other states where a like ground is recognized. Minor grounds differ in the different states, and the student will, of course, bear in mind the statutory provisions of his own state, and not permit himself to be misled by any remarks herein intended for the practitioners of some other state. Each of the various grounds for attachment will be considered in the following sections of this chapter.

§ 87. **"Absent and absconding" debtors—(a) What comprehended by the term "absent."**—Attachments are generally allowed to issue in a suit against "absent and absconding" debtors. Therefore, while the mere absence of the debtor is not of itself a ground for attachment, it still becomes a matter of importance to know what the statute comprehends by the term "absent," when such absence, together with "ab-

ner, 46 Ohio St. 52, 18 N. E. Rep. 430; on motion to dissolve it, Bundrem *v.* Denn, 25 Kan. 430.

Except in Texas, where it seems the truth of the affidavit can not be traversed in abatement of the writ, because it is there held that the writ is authorized, not upon a given state of facts, but upon an affidavit of certain facts. Dwyer *v.* Testard, 65 Tex. 432.

1. Sublett *v.* Wood, 76 Va. 318.

2. Denegre *v.* Milne, 20 La. Ann. 324; Todd *v.* Shouse, 14 La. Ann. 426.

3. Drummond *v.* Stewart, 8 Iowa 341.

4. Page *v.* Latham, 63 Cal. 75.

5. Evans *v.* Warner, 21 Hun (N. Y.) 74. See *post*, § 111.

sconding," or intent to evade the service of process, or intent to defraud creditors may constitute a ground for attachment. In the first place it may be said that a mere temporary absence of the debtor from the state, on business or on a voyage of pleasure, will be no ground for the attachment of his property,[1] where there is no evidence of an intention on his part to change his residence.[2] The word "absent" should not be taken or understood in its literal sense, but as intended to mean those who have absconded or are non-resident. Mere absence from the state, on business or pleasure, not being within the mischief of the act.[3] And, on the contrary, it is not necessary that there should be such a change of domicile as to make him a non-resident,[4] for he may be absent, within the meaning of the statute, when he notoriously resides abroad either permanently or temporarily.[5] Where the debtor leased his dwelling house and furniture, and declared that it was his intention to be absent from the state for two years or longer, and left the state, traveling for pleasure and health, without leaving an agent upon whom citation could be served, and it appearing that it would have been impossible to bring him into court, except through his property, an attachment was permitted.[6] An "absent or absconding debtor" must be one who lives out of the state, or has departed from the state, or from his usual abode, or who has so concealed himself in his house that he can not be served with process, with an intent unlawfully to delay or to defraud his creditors. Where a debtor went from a town of his usual abode to another town in the state, and there openly worked at his trade as a journeyman, for above three months, without taking any measures to conceal himself, he was held not to be an absent or absconding debtor with respect to a creditor in the place from which he left, though his friends

1. Pitts *v.* Burroughs, 6 Ala. 733; Mandel *v.* Peet, 18 Ark. 236; Watson *v.* Pierpont, 7 Martin (La.) 414.

2. Fuller *v.* Bryan, 20 Pa. St. 144.

3. Mandel *v.* Peet, 18 Ark. 236; Kingsland *v.* Worsham, 15 Mo. 657; Simons *v.* Jacobs, 15 La. Ann. 425.

4. As to non-residence, see *post*, § 90.

5. Thompson's case, 1 Wend. (N. Y.) 43.

6. Leathers *v.* Cannon, 27 La. Ann. 522.

And the fact that he did not absent

and neighbors did not know where he was, and his absence was a subject of conversation among them.[1] But an absence from the county on a visit for a period of only two days, and not for the purpose of evading service, will not justify a return of "not to be found" under the Tennessee code, providing that in any civil action, when the summons has been so returned as to any defendant resident of the county, the plaintiff may, at his election, sue out an attachment.[2] Where, however, the debtor leaves his home with the intention of going out of the state, and consummates this purpose, and is absent from his home pursuant to such intention for four months (that being the statutory period permitting an attachment), it must be regarded as absence from the state and ground for attachment, although some unlooked-for casualty may have delayed him a few days before passing beyond the territorial boundary of the state.[3] And if a person voluntarily absent himself from the place of his residence, with the intention of engaging in hostilities against his country, he can not be permitted to complain of legal proceedings regularly prosecuted against him as an absentee, on the ground that he is unable to return or to hold communication with the place where the proceedings are conducted. That would be carrying the privilege of *contra non volentem* to an unreasonable extent.[4]

Relating to the matter of the debtor's absence, information obtained from the family of the debtor, in answer to inquiries made at his residence, may be admitted in evidence in connection with other facts, to show that he has left home, the time

himself so long as he had expected to do did not affect attachment previously issued. Leathers *v.* Cannon, 27 La. Ann. 522.

1. Fitch *v.* Waite, 5 Conn. 117; Stanton *v.* Holmes, 4 Day (Conn.) 87; House *v.* Hamilton, 43 Ill. 185; Morgan *v.* Avery, 7 Barb. (N. Y.) 656; New Orleans Canal, etc., Co. *v.* Comly, 1 Robinson (La.) 231.

2. Robson *v.* Hunter, 90 Tenn. 242, 16 S. W. Rep. 466.

3. Spalding *v.* Simms, 4 Metc. (61 Ky.) 285; Clark *v.* Arnold, 9 Dana (39 Ky.) 305.

4. Ludlow *v.* Ramsey, 11 Wall. (U. S.) 581; Foreman *v.* Carter, 9 Kan. 674. As to one engaged in military service not being a non-resident see *post*, § 90 *et seq.*

when he went away, upon what business he went, and how long he intended to be absent.[1]

If the debtor, in fact, be not absent within the meaning of the law, the court will quash the attachment on motion, although there may have been great reason to suspect the debtor had gone abroad.[2]

When the foreign debtor has died an attachment will not lie, because there is no longer any "absent debtor," within the meaning of the attachment statute.[3]

§ 88. (b) **Who is an absconding debtor.**—The fact that the defendant is an "absconding debtor," is in most states sufficient to sustain an attachment.[4] To abscond in a legal sense means to hide, conceal, or absent one's self clandestinely with intent to avoid the service of legal process.[5] Absconding and concealing, as used in the statute, generally refer to such conduct only as prevents the service of process in the state. The fact of the presence or absence of the debtor, and not the fact of his residence or non-residence, is what is considered in sustaining an attachment on this ground.[6] An absent or absconding debtor must be one who lives out of the state, or has departed from the state or from his usual place of residence, or has so concealed himself in his house that he can not be served with legal process.[7] He may be an absconding debtor without

1. Matter of Bliss, 7 Hill (N. Y.) 187.

Not so if the information be obtained from persons disconnected with the family. The informants should then make affidavit. Matter of Bliss, 7 Hill (N. Y.) 187.

2. Wheeler *v.* Degnan, 2 Nott & McC. (S. C.) 323. See as to "Dissolution of Attachment," *post*.

3. Redfern *v.* Rumney, 1 Cranch C.C. (U. S. of D. C.) 300.

4. Young *v.* Nelson, 25 Ill. 464; Blankinship *v.* McMahon, 63 N. C. 180.

5. Bennett *v.* Avant, 34 Tenn. 152; Shugart *v.* Orr, 5 Yerger (Tenn.) 192. Stafford *v.* Mills, (N. J. Sup.) 32 Atl. Rep. 7.

6. Hoggett *v.* Emerson, 8 Kan. 262.

Where debtors, in failing circumstances, who leave their place of business and go into another county for two months to prevent inquiry by creditors as to the true condition of their affairs, and then go to Canada, are within the meaning of the civil code of Kentucky, providing for an attachment against defendants who have left the county of their residence to avoid service of summons. Bank of Commerce *v.* Payne, 86 Ky. 446, 8 S. W. Rep. 856.

7. Fitch *v.* Waite, 5 Conn. 117; Castellanos *v.* Jones, 5 N. Y. (1 Seld.) 164.

departing from the limits of the state.[1] A person who shuts himself up from his creditors is an absconding debtor.[2]

But the fact that the debtor is about to abscond is not a sufficient cause for an attachment.[3] Therefore, where it was alleged that the defendant was making secret preparations to leave for Ireland without any ostensible business to take him there, it was held not to be such a fact that the court could conclude that he was in reality making preparations to abscond.[4] Nor is the mere fact that the defendant has left the state sufficient to sustain an attachment on this ground. It must appear that he left with intent to abscond.[5]

Where the debtor has never been a resident of the state where the action is brought he can not be an absconding debtor within the meaning of the statute.[6] A citizen of another state, who removes therefrom clandestinely, and conceals himself to evade process, does not become a resident of the state in which he hides, within the attachment law, until he has acquired a fixed place of residence.[7] However, it is said in Vermont that the party must have been an inhabitant of the state, or have secretly absconded from, or kept concealed within it.[8] But although a legal settlement in the state is not necessary to con-

1. Field v. Adreon, 7 Md. 109.

Under the Maryland code, providing that any one who shall "secretly remove himself from his place of abode with intention to evade the payment of his just debts, shall be considered as having absconded," it is not necessary that the debtor should actually leave the state to entitle the creditor to a writ of attachment. Stouffer *v.* Niple, 40 Md. 477.

2. Ives *v.* Curtis, 2 Root (Conn.) 133.

3. Bennett *v.* Avant, 2 Sneed (34 Tenn.) 152.

4. Lorrain *v.* Higgins, 2 Chand. (Wis.) 116.

5. Branson *v.* Shinn (1 Green), 13 N. J. L. 250; City Bank *v.* Merritt (1 Green), 13 N. J. Law 131.

A carpenter by trade enlisted in the army during the war with Mexico, and while he was absent at the the seat of war, a creditor sued out an attachment. It was held that the debtor had not fraudulently or privately absconded, within the meaning of the law allowing attachments, and there was no probable cause to suppose that he had. Abrams *v.* Pender, Busby (N. C.) L. 260; same principle in Haynes *v.* Powell, 69 Tenn. 347.

6. Middlebrook *v.* Ames, 5 Stew. & P. (Ala.) 158.

7. Shugart *v.* Orr, 5 Yerg. (Tenn.) 192.

8. Austin *v.* Palmer, 2 Vt. 489; Baxter *v.* Vincent, 6 Vt. 614.

stitute a debtor an inhabitant within the meaning of the act directing proceedings against trustees of absconding debtors, yet a man having a usual place of residence in another state coming to Vermont to teach a school for three months, and going once or twice to his home during that time, and returning there at the end of the term, is not an inhabitant of Vermont within the act.[1] A mere transient residence in another place can not make one an absconding debtor.[2] Neither will the fact that the debtor is a follower of either cause during a civil war, and separated from the place where the court is held by hostile lines of opposing armies.[3] Neither will a stranger in disguise flying from a foreign country to avoid creditors, and temporarily concealing himself in a house taken for that purpose, and not with a view to a permanent residence, be an absconding debtor within the meaning of the law when he has contracted no debt in the state which he could defeat by absconding.[4]

Where the manner of the defendant's leaving his place of residence is introduced to show that he is absconding, his sayings at the time he left or immediately anterior thereto are part of the *res gestæ* of the case.[5] But when they are made two weeks before, and not in the presence of the creditor or shown to have come to his knowledge previous to his suing out the attachment, they are not so admissible. And declarations made after the judgment is issued are incompetent.[6] And if such statements be introduced by the plaintiff to show that the defendant is absconding, the defendant may show statements which he made out of the presence of the plaintiff for the purpose of showing that his removal was not with intent to remain or abscond.[7]. And where the defendant shows facts contrary

1. Boardman *v.* Bickford, 2 Aik. (Vt.) 345; Risewick *v.* Davis, 19 Md. 82.

2. Fitzgerald's Case, 2 Caines (N. Y.) 318.

3. Haynes *v.* Powell, 1 Lea (Tenn.) 347.

4. Thurneyssen *v.* Vouthier, 1 Miles (Pa.) 422.

5. Oliver *v.* Wilson, 29 Ga. 642; Burgess *v.* Clark, 3 Ind. 250; Pitts *v.* Burroughs, 6 Ala. 733; Ross *v.* Clark, 32 Mo. 296.

6. Havis *v.* Taylor, 13 Ala. 324.

7. Offutt *v.* Edwards, 9 Rob. (La.) 90.

But what will support a suit against him as a *non-resident* see *post*, § 90, and Farrow *v.* Barker, 3 B. Mon. (Ky.) 217.

to the facts shown by the plaintiff it will defeat the plaintiff's cause of action, although he may have had reason to believe at the time he sued out the attachment that the debtor had absconded or was concealed.[1] However, the appearance of the defendant in the suit is not of itself sufficient to show that he had not at the time the writ was issued.[2] But if the defendant in the attachment traverse the allegations of the plaintiff in the affidavit or petition for the issuance of the writ, the burden of proof is on the plaintiff in the attachment.[3]

Foreign attachment was not sustained against a partnership, as absconding or concealed debtors, when all the members of the firm had not absconded or kept concealed. A plea in abatement in such a case, that one of the debtors is not an absconding or concealed debtor, seems to be sufficient,[4] unless the firm be insolvent.[5] But in one case when the affidavit showed that the firm of A & Co., "composed of A and certain parties unknown to the deponent, absconds," the attachment was sustained, although a motion was made to dismiss it on the ground that all the members of the firm had not absconded.[6]

It is held in Illinois that a statute authorizing a sheriff to pursue and take the property of the absconding debtor in any county in the state, and to return it to the county from which the writ issued, contemplates that it is being removed at the

1. Matter of Warner, 3 Wend. (N. Y.) 424; Matter of Chipman, 1 Wend. (N. Y.) 66.

But in North Carolina it has been said that, although a defendant is not about to abscond, yet, if the plaintiff has made oath that he is, the proceedings in the attachment will be sustained. O'Neal v. Owens, 1 Hayw. (N. C.) 365.

2. Phillips *v.* Orr, 11 Iowa 283.

3. Oliver *v.* Wilson, 29 Ga. 642.

Where it appeared that a debtor had reason to abscond; that he went away without informing his relatives; that his wife, several days after his departure, received a letter from him, which caused her great grief, but the contents she refused to divulge; that she told her sister that he was in Canada, and no explanation of his conduct is shown in defense, it was inferred that his intent was to avoid service of process, or to defraud his creditors. Buell *v.* Van Camp, 28 N. Y. State 907.

4. Leach *v.* Cook, 10 Vt. 239.

5. Ogilvie *v.* Washburn, 4 Green (Iowa) 548; Courrier *v.* Cleghorn, 3 Green (Iowa) 523; Buckingham *v.* Swezy, 25 Hun (N. Y.) 84.

6. Hines *v.* Kimball, 47 Ga. 587.

As to the bringing of a suit in attachment against the interest of an individual partner on his individual indebtedness when he alone has absconded, see *ante* § 47, *et seq.*

time or after the issuing of the writ, or so recently before the issue, that the property has not acquired another *status* in such other county in order that there may be no presumption that the defendant removed in good faith.[1] In this case the removal was twelve days before the writ issued and the defendant accompanied his motion to quash with an affidavit denying that he was about to depart from the state to the injury, etc., the attachment was dismissed, although it was proved that the debtor had previously proposed to and agreed with another person to go to another state and engage with him in the livery business.

The rule of law of another state that a creditor may sue out an attachment against an absconding debtor before the debt is due belongs to the *lex fori;* and will not enable a creditor to obtain an attachment before the debt is due in a state where attachments are not permitted before the debt is due.[2]

§ 89. (c) **Who is a concealed debtor.**—The fact that the debtor conceals himself does, under many statutes, give the creditor ground upon which he may have an attachment to aid in enforcing his demand. The term "absconding" and the term "concealed" are nearly synonymous when used in the attachment law. When a party absconds or conceals himself so that process can not be served upon him, it is, in Tennessee, a ground for attachment.[3] And in Illinois one who designedly places himself beyond the reach of his creditors by avoiding service of process is a concealed debtor and his property is liable to attachment.[4] But the mere fact that the defendant does not live within the county where he does business, does not amount to "concealing" himself. And where he had no intention to avoid service of process or of remaining permanently away it is not a ground for an attachment.[5] The "concealment" contemplated by the statute involves the intention upon the part of the debtor to delay or prevent his creditors

1. House *v.* Hamilton, 43 Ill. 185.
2. Pegram *v.* Williams, 4 Rich. Law (S. C.) 219.
3. Conrad *v.* McGee, 9 Yerger (Tenn.) 428.
4. Young v. Nelson, 25 Ill. 565.
5. Boggs v. Bindskoff, 23 Ill. 66.

from enforcing their demands by the ordinary legal modes. This he may accomplish by secreting himself upon his own premises, or by departing secretly to a more secure spot, either in or out of the county of his residence.[1]

It is not necessary that the process should be first issued, or that an attempt should be made by the officer to find the debtor, before one is alleged to be "concealed." If he conceals himself so that an attempt to serve process would be useless it is sufficient. One who leaves the place of his residence to avoid service of process, and requires false information to be given of his movements, "conceals himself so that process can not be served upon him" within the meaning of the statute.[2] But an attachment will not be supported on the ground that the defendant keeps himself concealed, with intent to avoid service of summons, when it only appears that he was not found at his place of business by the plaintiff's agent on two successive days.[3]

If the defendant leave the county for the purpose of avoiding arrest on a criminal warrant, and the effect is to avoid the service of summons in a civil action for the same wrong, an attachment will lie under a statute where the fact that he "has left the county" of his residence to avoid service of the summons is a ground therefor;[4] or where the fact that he "secretes himself so that the ordinary process of law can not be served on him" is a statutory ground.[5]

It is a good defense to an alleged concealment to show that

1. Dunn v. Salter, 1 Duv. (Ky.) 342.

What is not concealment within the New York code, see Reynolds *v.* Horton, 22 N. Y. S. 18, 67 Hun (N. Y.), 122.

What is a leaving of the county of their residence to avoid service of summons within the meaning of the civil code of Kentucky, see Bank of Commerce *v.* Payne, 8 S. W. Rep. 856, 86 Ky. 446.

2. North *v.* McDonald, 1 Bissell 57.

3. Head *v.* Wollner, 6 N. Y. S. 916, 53 Hun (N. Y.) 615. See, also, Bank of Commerce *v.* Payne, 86 Ky. 446, 8 S. W. Rep. 856.

Further as to "Secreting property with intent to defraud," see Reynolds *v.* Horton, 67 Hun (N. Y.) 122, and also *post*, § 111.

4. Bank of Commerce v. Payne, 86 Ky. 446.

5 Malone *v.* Handley, 8 So. Rep. 189, 81 Ala. 117. See, also, Evans *v.* Saul, 8 Martin (La.) N. S. 247.

it was in the neighborhood generally known where he had gone, and the knowledge could have been obtained by the creditor upon inquiry.[1] But if the weight of the evidence is clearly against the grounds alleged to sustain the attachment when there is evidence that the defendant has absconded, with intent to defraud his creditors, and has left the county of his residence to avoid service, the attachment will be upheld.[2]

§ 90. **"Non-resident" debtors—(a) "Residence" as contemplated by the attachment laws.**—The fact that a debtor is a non-resident is an almost universal ground for attachment. We can best determine who is a non-resident by ascertaining who is a resident; then the negative will be within the meaning of the statute. The question of "residence" within the meaning of the attachment law is one of intention, to be deduced from the facts and circumstances in each case.[3] It is impossible to define it with absolute certainty, but such general interpretation may be here given as to be of material aid in determining who is or is not such non-resident as to be liable in foreign attachment.

Residence is the fact of being in a certain place with the intention to make of it a home.[4] It is a person's usual place of abode, the place to and from which he goes and returns daily, weekly or habitually in his ordinary avocations, wherever the same may be carried on.[5] "Resident" is said to be tantamount

1. Walcott *v.* Hendrick, 6 Tex. 406; Thomas *v.* Dickinson, 58 Hun (N. Y.) 603, 11 N. Y. S. 436.

A plea in abatement is good which avers "that he departed from the state for a temporary purpose only, and with the intention of returning; that he is not a non-resident of the state of Tennessee and was not when the bill was filed, within the meaning and intendment of the attachment laws, and that he is not absconding or concealing himself, and was not when the bill was filed," etc., etc. Klepper *v.* Powell, 6 Heisk. (Tenn.) 503. See Gill *v.* Wyatt, 6 Heisk. (Tenn.) 88. In answer to a complaint, which charges that "defendant is not an inhabitant of Tennessee, but has so absconded and concealed himself that the ordinary process of law can not be served on him."

2. Holland v. Commercial Bank, 36 N. W. Rep. 113, 22 Neb. 571.

3. Wells v. People, 44 Ill. 40; Ritter *v.* P. M. L. Ins. Co., 32 Kan. 504; Guier *v.* O'Daniel, 1 Binney (Pa.), 349, note; Barnet's Case, 1 Dallas (U. S.) 152; Keller *v.* Carr, 40 Minn. 428; Stafford *v.* Mills, (N. J.) 31 Atl. Rep. 1023.

4. McCollem *v.* White, 23 Ind. 43.

5. Green *v.* Beckwith, 38 Mo. 384.

to "inhabitant."[1] And "citizen" is said to be synonymous with inhabitant or permanent resident;[2] therefore an unnaturalized alien, residing and doing business in the state, is, for commercial purposes, a "citizen" in contemplation of the attachment laws.[3] Residence means a settled abode, for the time being, for purposes of business or pleasure:[4] the place of abiding or dwelling for some considerable time.[5] It has been well said that "one who comes from another place to reside among us, who introduces his family, engages in trade, takes a house and contracts debts, is a resident,"[6] although he arrived only a few days before the attachment,[7] provided he has no present intention of removing therefrom.[8] But bringing a family into a state for a temporary purpose—as to reside with a relative, while looking for an opportunity to engage in another business—will not make one a resident.[9] Nor will the taking of a house to reside in temporarily for the purpose of concealment, while fleeing from justice.[10] One who temporarily visits the state can not be deemed an "inhabitant," so as to be subject to the attachment law.[11] An immigrant who has left his native land and is living in the state without any determination

1. Roosevelt *v.* Kellogg, 20 Johns, (N. Y.) 208.

2. Risewick *v.* Davis, 19 Md. 82.

3. Field *v.* Adreon, 7 Md. 209.

4. Hanson *v.* Graham, 82 Cal. 631.

5. Long *v.* Ryan, 30 Grattan (Va.) 718; Kennedy *v.* Baillie, 3 Yeates (Pa.), 55.

6. Barnet's Case, 1 Dallas (U. S.) 152.

7. Chesney *v.* Francisco, 12 Neb. 626.

8. Stratton *v.* Brigham, 2 Sneed (34 Tenn.) 420.

It is held in West Virginia that if a man's family has been removed to that state, or, if, having no family, he has himself removed there, and entered into business, and his means and property have been brought there, and he dwells there, and his business engagements in that state are such as to render his stay uncertain as to duration, he is not a non-resident, within the purview of the attachment law. Andrews *v.* Mundy 36 W. Va. 22, 14 S. E. Rep. 414.

In May a man went from Illinois to Nebraska, with the intention of taking up a new home, and of leaving his wife in Illinois until October; an action begun against them in Nebraska, in June, on the ground that they were non-residents, was dismissed. Swaney *v.* Hutchins, 13 Neb. 266.

9. Burrows *v.* Miller, 4 How. Pr. (N. Y.) 349.

10. Thurneyssen *v.* Vouthier, 1 Miles (Pa.) 422.

11. Barnet's Case, 1 Dallas (U. S.) 152; Matter of Fitzgerald, 2 Caines (N. Y.) 318.

to reside anywhere else is a resident,[1] though he be living in an American hotel only until he can procure a suitable house.[2]

While it has been said that "residence" in the attachment law is used in the same sense as domicile,[3] and that there must be a change of domicile already effected before one can become liable under the statute,[4] yet the weight of authority indicates that domicile has a broader meaning than residence, and that "residence" implies an established abode for business or other purposes, fixed permanently for a time, although there may be an intent existing all the while of returning at some time to his former home. And when one is such a resident, he is not liable to foreign attachment, although he have a domicile in another state.[5]

The term "non-resident," in the attachment law, therefore, means one who has an abode in another state;[6] one who has not even a temporary place of residence, at which a summons might lawfully be served,[7] or one who has no place of abode within the state, nor any place which he can call his home, nor to which he can return on coming to the state, is a non-resident.[8] Voting in another state seems to be a decisive point,[9] although not necessary to constitute one a non-resident, and one may have a domicile in the state and yet be a "resident" in another state, within the meaning of the attachment law, and be there also free from attachment on this ground.[10] One who is notoriously abroad may be a non-resident.[11]

1. Heidenbach *v.* Schland, 10 How. Pr. (N. Y.) 477.

2. Knapp *v.* Gerson, 25 Fed. Rep. 197.

3. Chariton county *v.* Moberly, 59 Mo. 238.

4. Smith *v.* Story, 1 Humph. (Tenn.) 420.

5. Krone *v.* Cooper, 43 Ark. 547; Foster *v.* Hall, 4 Humph. (Tenn.) 345; Hickson *v.* Brown, 92 Ga. 225, 17 S. E. Rep. 1035.

6. Perrine *ads.* Evans, 35 N. J. L. 221.

7. Baldwin *v.* Flagg, 43 N. J. L. 495.

8. Wood *v.* Hamilton, 14 Daly (N. Y.) 41; Farley *v.* Farior, 6 La. Ann. 725.

9. Leonard *v.* Stout, 36 N. J. L. 370; Wolf *v.* McGavock, 23 Wis. 516; Quebec Bank *v.* Carroll, 1 So. Dak. 372, 47 N. W. Rep. 397; Canda *v.* Robbins, 7 N. Y. S. 896.

10. See *post*, § 97, as to Domicile, etc.

11. Matter of Thompson, 1 Wend. (N. Y.) 43.

The fact that the defendant has been abroad, for two and a half years, while taking charge of a trading ves-

One who is a non-resident when the attachment was sued out, can not have the attachment dismissed because he has subsequently become a resident.[1]

§ 91. (b) **Effect of temporary absence.**—We have shown above that mere temporary residence will not prevent one from being liable to attachment on the ground of non-residence, and it is likewise true that the mere temporary absence from the state in pursuit of business or pleasure does not make one a non-resident within the meaning of the attachment law when he has a domicile therein. He must have a fixed abode elsewhere with the intention of remaining there for a definite period for business or other purposes.[2] An indefinite abode, without intention of remaining permanently, does not make a residence.[3]

One who is beyond the state limits, engaged in actual military service, is neither a non-resident nor an absconding debtor within the meaning of the attachment law, and is not liable

sel in which he is interested, and which has made several voyages during that time to and from foreign ports, will make him a non-resident, notwithstanding he has kept up his house in the place of his original residence. Burrill *v.* Jewett, 2 Robt. (N. Y.) 701.

Voluntary absence from the state for ten years without communicating in regard to the management of property or of the person's whereabouts or intention, is good evidence of an intent to abandon the domicile, in Louisiana, and justifies an attachment. Walker *v.* Barrelli, 32 La. Ann. 467.

The sworn averment of the creditor is *prima facie* proof of the debtor's absence. Walker *v.* Barreli, 32 La. Ann. 467.

One who has made declarations that his home is in another state, where his wife owns a house and resides, and that he frequently visits her there and has done so for years, is a non-resident subject to attachment. Loder *v.* Littlefield, 39 Mich. 512.

Again, one who, after selling nearly all his personalty and placing his farm in the hands of an agent for sale, left the state, and did not return until attachment had been levied upon his farm, when he admitted that when he left he did not expect to make that place his home again, is a non-resident at the time of the attachment. Ritter *v.* Phoenix Mut. Life Ins. Co., 32 Kan. 504.

1. Larimer *v.* Kelley, 10 Kan. 298; Nailor *v.* French, 4 Yeates (Pa.) 241.

2. Fitzgerald *v.* McMurran (Minn.) 59 N. W. Rep. 199; Alston *v.* Newcomer, 42 Miss. 186.

3. Green *v.* Beckwith, 38 Mo. 384; Fuller *v.* Bryan, 20 Pa. St. 144; Egan *v.* Lumsden, 2 Disney (Ohio) 168; Cawker City State Bank *v.* Jennings (Iowa), 56 N. W. Rep. 494; Boardman *v.* Bickford, 2 Aikens (Vt.) 345. See, also, *post*, § 96, Effect of acquiring residence elsewhere.

to attachment.[1] But such exemption seems not to extend to persons engaged in the naval service.[2]

§ 92. (c) **Effect of an intention to return.**—While the mere temporary absence from the state of the debtor's residence will not constitute him a non-resident within the meaning of the attachment law because of his having had no intention to reside abroad, yet his intention of retaining his residence in the former place must amount to a fixed purpose so to do; for the mere intention to return to his original residence in the remote future, after the expiration of an indefinite time required for the fulfillment of the purposes for which he went away will not prevent him from being a non-resident,[3] even though he may have expressed such an intention,[4] and though he may have made frequent visits to his former home.[5] This rule has been applied in the case of a contractor going from his state into a foreign country for the purpose of prosecuting his business there and remaining if successful, and who had been absent four months at the time of the attachment, though he had repeatedly stated before leaving that he intended to return shortly;[6] and in the case of a Methodist preacher assigned to a district outside his state and his residing there, although he intended to return and claim the residence in the former state and visits it once or twice a year;[7] and to one who has remained absent three years, although he has all the time intended to return to his original residence.[8] The mere intention to return is deemed immaterial when the fact of the non-residence is shown.[9]

Where the intention to return is fixed, and the debtor leaves his family residing in the original home, upon whom the ordi-

1. Haynes *v.* Powell, 69 Tenn. 347; Abrams *v.* Pender, Busby (N. C.) L. 260.

2. Abrahams *v.* Bartlett, 18 Iowa 513.

3. Wheeler *v.* Cobb, 75 N. C. 21; Hanson *v.* Graham, 82 Cal. 631; Wolf *v.* McGavock, 23 Wis. 516; Weitkamp *v.* Loehr, 53 N. Y. Supr. Ct. 79; Haggart *v.* Morgan, 5 N. Y. 422.

4. Morgan *v.* Nunes, 54 Miss. 308.

5. Wheeler *v.* Cobb, 75 N. C. 21.

6. Hanson *v.* Graham, 23 Pac. Rep. 56, 82 Cal. 631.

7. Carden *v.* Carden, 12 S. E. Rep. 197, 107 N. C. 214.

8. Haggart *v.* Morgan, 5 N. Y. 422.

9. Charles *v.* Amos, 10 Colo. 272, 15 Pac. Rep. 417.

nary process of law can be served so as to bind the debtor, he is not a non-resident, for he still has a legal domicile in the former place, although he may have a fixed abode for an indefinite period in another state.[1]

§ 93 (d) **Effect of an intention to remove.**—A debtor does not become a non-resident by merely declaring an intention to remove from the state.[2] There must be an actual removal before the attachment suit is begun.[3] But where one, after having declared his intention to leave the state, has actually gone, he is a non-resident, even though he return within a month and after the suit is begun.[4] And it has been held that having declared an intention to remove and having actually removed from the place of residence, the debtor may become a non-resident, although he is within the state at the time of the attachment.[5]

§ 94. (e) **Effect of leaving family and going abroad.**—Non-residence being wholly a question of intention (and that intention being deducible from the circumstances) one who departs from the state with the intention to remain abroad and make a home for his family becomes a non-resident at the place he left, although his family still remain in the original home.[6] Immediately upon his arrival within the other state with the intention to stay and make a home in it, he becomes a non-resident of the state he left.[7] But he does not become so until he is without the state of his former residence.[8] But he has not ceased to become a resident of the former state unless he

1. Bowers *v.* Ross, 55 Miss. 213. See further, as to effect of leaving family and going abroad, *post*, § 94.

2. Lyle *v.* Foreman, 1 Dall. (U. S.) 480; Smith *v.* Storey, 1 Humph. (20 Tenn.) 420; Holliday *v.* Mansker, 44 Mo. App. 465.

3. Adams *v.* Evans, 19 Kan. 174; Charles *v.* Amos, 10 Colo. 272, 15 Pac. Rep. 417; Larimer *v.* Kelly, 10 Kan. 298.

4. Farrow *v.* Barker, 3 B. Mon. (Ky.) 217.

5. Clark *v.* Ward, 12 Gratt. (Va.) 440.

6. Wells *v.* People, 44 Ill. 40; Moore *v.* Holt, 10 Gratt. (Va.) 284. See Croft *v.* Apel, 8 Houst. (Del.) 162, 32 Atl. Rep. 172.

7. Whitley *v.* Steakly, 50 Tenn. (3 Baxter) 393.

8. Ballinger *v.* Lautier, 15 Kan. 608.

intends to remain in the latter, and therefore he is a non-resident of the latter until he has a fixed purpose of remaining.[1]

One who suddenly departs from the state as a fugitive from justice, leaving his family and making no provision for their removal, can not be deemed a non-resident so as to subject his property to attachment.[2]

§ 95. (f) **Effect of the act of removing family and goods.**—The mere fact that one is removing his goods into a neighboring state does not, before such removal is consummated, constitute him a non-resident in the state in which he did live. For, even though he may have given up the keys to his former house to an incoming tenant, he is not himself a non-resident until he has removed therefrom.[3] But after having declared his intention to remove to another state, and having consummated the removal from his former home, he will be there a non-resident it seems, although some unlooked-for casualty may have delayed him some days in getting beyond the territorial boundary of the state.[4]

§ 96. (g) **Acquiring residence elsewhere.**—While one may, by the act of removal from the state of his former home, with the intention of acquiring a home elsewhere, become a non-resident in the state of his former residence,[5] yet it is the general rule that he does not become such a non-resident until he has acquired a new residence or place of abode, with the intention of remaining in the state to which he has removed.[6] But the

1. Cawker City State Bank *v.* Jennings (Iowa), 56 N. W. Rep. 494. See *ante*, § 91.

2. Starke *v.* Scott, 78 Va. 180; Shugurt *v.* Orr, 5 Yerger (Tenn.) 192.

But it can not be attached as that of an absconding debtor. See *ante*, § 88.

3. Kugler *v.* Shreve, 28 N. J. L. (4 Dutch.) 129; Ballinger v. Lantier, 15 Kan. 608; Smith *v.* Story, 1 Humph. (Tenn.) 420.

He is still a "householder" and entitled to the rights secured to him as such by the exemption laws. Anthony *v.* Wade, 1 Bush (Ky.) 110.

4. Spalding *v.* Simms, 4 Metc. (Ky.) 285.

One case declares that he is directly a non-resident when he begins the removal and before he gets beyond the state line. Clark *v.* Ward, 12 Gratt. (Va.) 440. See *ante*, § 93.

5. See *ante*, § 94.

6. Pfoutz *v.* Comford, 36 Pa. St. 420; Tibbitts v. Townsend, 15 Abb. (N.Y.) Pr. 221. See Hanson *v.* Graham, 23 Pac. Rep. 56, 82 Cal. 631.

fact that one has been once an inhabitant of the state will not forever protect him from foreign attachment there when he has notoriously emigrated and settled elsewhere,[1] though going clandestinely into a state will not make one a resident until he has procured a fixed place of abode.[2]

There is an obvious difference in regard to the acquiring of residence elsewhere in states which make "non-residence a ground for attachment" and a statute which makes it a ground for attachment that the debtor is "not a resident of the state." For the requirements of the latter statutes are satisfied when the debtor has departed from the state with his family and remains, although he may not have acquired a residence elsewhere, and although he may intend to return in the future.[3] One who acquires a residence within a state by residing there for a time will lose such residence by returning to his original home and taking his effects with him, if he leave it uncertain whether or not he will come back.[4] And it has been said that though he return after a sojourn of three weeks, his residence here will be only of a temporary character.[5]

§ 97. (h) "Non-resident," although domicile in the state.— Non-residence is a fact and is to be determined by the ordinary and obvious *indicia* of residence. It can not be determined by the place of the debtor's political domicile. One may become a non-resident by living abroad, although by the fact of his intention to return his political domicile will continue in the state.[6]

1. Lyle *v.* Forman, 1 Dall. (U. S.) 480.

2. Shugart *v.* Orr, 5 Yerger (Tenn.) 192.

3. Hanover Nat. Bank *v.* Stebbins, 23 N. Y. S. 529, 69 Hun (N. Y.) 308; Union Square Bank v. Reichman, 23 N. Y. S. 531, 69 Hun (N. Y.) 617. See also *ante*, § 92.

4. Matter of Wrigley, 4 Wend. (N. Y.) 602.

5. Matter of Wrigley, 8 Wend. (N. Y.) 134.

6. Keller *v.* Carr, (Minn.) 42 N. W. Rep. 292, 40 Minn. 428; Hanover Nat. Bank v. Stebbins, 23 N. Y. S. 529, 69 Hun (N. Y.) 308; Union Square Bank *v.* Reichman, 23 N. Y. S. 531, 69 Hun (N. Y.) 617; McKinley *v.* Fowler, 1 How. Pr. (N. Y.) n. s. 282; Mitchell v. United States, 21 Wall. (U. S.) 350; Haggart *v.* Morgan, 5 N. Y. (1 Seld.) 422.

Obligors in a bond given to obtain the release of attached property are estopped from denying that the defendant is a non-resident when the attachment is made upon that ground. Haggart *v.* Morgan, 5 N. Y. (1 Seld.) 422.

The right to have a foreign attachment issued depends upon the residence and not upon the change of domicile.[1]

§ 98. (i) **Effect of doing business in the state while residing elsewhere.**—One is a non-resident when he resides in another state.[2] He may have a commercial domicile in one state and yet if he reside in another state he will be liable to an attachment as a non-resident in the state of his commercial domicile.[3] Therefore, where a merchant does business in one state and his family resides in another, which he calls his home and where he spends his nights and Sundays and such time as his interests will permit, he is a non-resident in the state where he transacts business.[4] Even though he may have furnished apartments in the state where he does business and where he lodges and takes his meals.[5] Persons arriving from another

1. Matter of Thompson, 1 Wend. (N. Y.) 43; Brown *v.* Crane, 13 So. Rep. 855, 69 Miss. 678.

It was alleged in the attachment proceedings that the defendant was a non-resident. It appeared on the trial of the case that when a resident of Minnesota he was appointed government blacksmith to an Indian reservation in South Dakota and had removed there with his family and part of the household effects, leaving the other part in his former home in Minnesota, which a tenant occupied part of the time. During a period of fourteen months he and his wife several times returned and occupied the house in Minnesota. The court said that his actual residence was in South Dakota, and that since his *status* as a non-resident was determined by the place of his actual residence, and not by the place of his domicile, the attachment would be sustained. Lawson v. Adlard, 46 Minn. 243, 48 N.W. Rep. 1019.

2. Perrine *v.* Evans, 35 N. J. L. 221. Compare Robbins *v.* Alley, 38 Ind. 553.

3. Rayne *v.* Taylor, 10 La. Ann. 726.

4. Chaine *v.* Wilson, 8 Abb. (N. Y.) Pr. 78; Lee *v.* Stanley, 9 How. (N.Y.) Pr. 272; Wallace v. Castle, 68 N. Y. 370; Towner *v.* Church, 2 Abb. (N.Y.) Pr. 299; Barry *v.* Bockover, 6 Abb. (N. Y.) Pr. 374; Wallace *v.* Castle, 68 N. Y. 370; Robinson *v.* Morrison, 2 App. D. C. 105, s. c. *Id.* 129.

5. Murphy *v.* Baldwin, 11 Abb. (N. Y.) Pr. n. s. 407, 41 How. (N. Y.) Pr. 270. See also Bowman *v.* Perine, 7 N. Y. S. 155, 23 Abb. N. C. (N. Y.) 236.

One living with his wife in New Jersey, where he registers and votes, is assessed for personalty and has business letters sent there, and claiming that as his residence, is a non-resident of New York, where he does business, but is neither registered as a voter nor assessed for personalty. Canda *v.* Robbins, 7 N. Y. S. 896.

The fact that one has a clerk at his place of business does not make the proprietor a resident there, and he will be liable to process of foreign at-

state expecting to remain and transact business who have property within the jurisdiction of the court are not to be deemed "non-residents" within the meaning of the attachment law.[1] Therefore, even though one be an unnaturalized foreigner, he is, if he reside and transact business within the state, for commercial purposes and in contemplation of the attachment law a citizen of the state.[2]

§ 99. **(j) Effect of doing business out of the state.**—One who has a legal residence or domicile in the state where legal process can be served is not made a non-resident and liable to attachment as such by being established in business in another state.[3]

§ 100. **When attachment will lie against one as non-resident.**—What is termed "foreign attachment" is the remedy by attachment against debtors who are absent and non-resident, and the term "domestic attachment" is the remedy provided against resident debtors upon some one of the other grounds, as when absenting or concealing themselves.[4] It has been determined that there is nothing unconstitutional in a law permitting an attachment to issue against a non-resident debtor,[5] and a foreign attachment may properly be maintained against a person who has never been within the state.[6] And it will lie against a non-resident debtor, notwithstanding the fact that he is in the state temporarily when the writ issues.[7]

tachment. Chase *v.* Ninth, etc., Bank, 56 Pa. St. 355.

A foreign corporation, leasing and operating a road in Georgia, is not, because of its business there, exempt from process of attachment as a non-resident. Breed *v.* Mitchel, 48 Ga. 533.

1. Munroe *v.* Williams, 35 S. C. 572, 15 S. E. Rep. 279.

2. Field *v.* Adreon, 7 Md. 209.

3. Brundred *v.* Del Hoyo, 20 N. J. L. (1 Spenc.) 328. See Stout *v.* Leonard, 37 N. J. L. 492.

4. Fuller *v.* Bryan, 20 Pa. St. 144.

5. Pyrolusite Manganese Co. *v.* Ward, 73 Ga. 491.

6. Redwood *v.* Consequa, 2 Browne (Pa.) 62.

7. Burcalow *v.* Trump (Del.), 1 Houst. 363.

But one may be a resident, so as not to be liable to a foreign attachment, and yet not be an inhabitant so as to become subject to a domestic attachment. Bainbridge *v.* Alderson, 2 Browne (Pa.) 51.

One has been held liable in attachment as against a non-resident, who had previously resided within the ju-

In all instances the right to maintain foreign attachment depends entirely upon the construction of the controlling statute. In Louisiana it may be sued out in all cases where a defendant resides without the state, and even though the claim be secured by mortgage upon land within the state.[1] In Arkansas it will lie not only against one who is already a non-resident, but against one who is about to remove out of the state, or is about to remove his goods and effects out of the state, or who is secreting himself so that ordinary process of law can not be served upon him.[2] And in Missouri, an attachment founded on the statutory ground of non-residence may as well be founded on the cause of action in tort as upon contract, if the cause be alleged in a proper affidavit.[3] But where there is no matured cause of action for the principal suit, and under a statute not permitting an attachment on a debt before it is due unless the court order the clerk to issue the same, an attachment on the sole ground that the defendant is a non-resident will confer no jurisdiction on the court issuing the same.[4]

Where there is no special statute to the contrary, an attachment against a non-resident will lie in any court which has jurisdiction of the subject-matter of the attachment, regardless of the plaintiff's place of residence and of the location where the indebtedness arose. Some statutes have required that the plaintiff applying for an attachment must have been a resident at the time, or else that the indebtedness must have arisen within the state or under a contract made in the state. Under such a statute three partners who resided in England became there bankrupt while having effects in Maryland. A citizen of Maryland sustained an attachment against one-third of such effects to satisfy a debt contracted in England by one of the partners.[5] Where the statute requires that the creditor who

risdiction of the court and had there been discharged of the plaintiff's debt. Brolaskey *v.* Landers, 2 Miles (Pa.) 371.

1. Sandel *v.* George, 18 La. Ann. 526.

2. Mandel *v.* Peet, 18 Ark. 236.

3. Houston *v.* Woolley, 37 Mo. App. 15.

4. Philpott *v.* Newman, 11 Neb. 299.

5. Wallace *v.* Patterson, 2 Harr. & M. (Md.) 463.

This principle has been elsewhere applied under a similar state of facts. Owen *v.* Miller, 10 Ohio St. 136; Ward *v.* Morrison, 25 Vt. 593.

And an attachment was also sus-

applies for foreign attachment shall reside in the state, or that the indebtedness must have arisen on a contract made within the state, the application must show that state of facts; for an affidavit averring that one of nine plaintiffs is a resident will not authorize an attachment,[1] unless they are partners, in which case a showing that their place of business is in the state is sufficient.[2]

§ 101. **Oath of affiant not conclusive of debtor's non-residence.**—The contemplation of the law when granting a creditor a writ of attachment against a non-resident debtor is that such debtor, because of his foreign residence, can not be served with summons, and that attachment is necessary for the creditor's protection; therefore the matter of non-residence must be a fact and must be shown to be such. The proof to sustain the attachment must be such as is received in ordinary legal proceedings; otherwise the officer granting the writ will be a trespasser. The mere return of an execution that the defendant could not be found is not the satisfactory proof required.[3] The proof must be positive and not that the affiant believes that the debtor resides without the state.[4] The oath of the plaintiff in regard to the non-residence of the debtor may give the court jurisdiction to issue the attachment, but it is not conclusive evidence of the fact.[5]

tained under such a statute upon an indebtedness which grew out of transactions with the defendant while he was a resident citizen of the state.—Dorsey *v.* Kyle, 30 Md. 512.

1. People *v.* Griffith, Hill & D. (N. Y.) Sup. 447.

2. Renard *v.* Hargous, 2 Duer (N. Y.) 540. See "Affidavit," *post*, § 127, and see as to "Corporations," *post*, § 105.

3. Vosburgh *v.* Welch, 11 Johns. (N. Y.) 175.

4. *Ex parte* Haynes, 18 Wend. (N. Y.) 611; but see Matter of Fitch, 2 Wend. (N. Y.) 298.

5. Clark *v.* Likens, 26 N. J. L. (2 Dutch.) 207; Weber *v.* Weitling, 18 N. J. Eq. 441.

Consequently where an affidavit set out that the defendant was a non-resident; that he could not be found in the state; that the affiant was informed and believed he resided in Sweden, and it appeared on the trial that he was a resident of the state and only temporarily in Sweden on business, the attachment was set aside. Cooper *v.* Smith, 8 Wis. 358. See "Affidavit," *post*, § 127.

§ 102. **Effect of defendant's residing in another part of the state when suit is begun.**—When a foreign attachment has been sued out, it will be a complete defense thereto for the debtor to show that he does not reside outside the state.[1] And even though judgment may have been obtained in a foreign attachment, it may be defeated by showing that the defendant resided in the state. And if the property has been alienated before the seizure, the judgment will be void, although the defendant does not appear in the suit.[2]

§ 103. **Effect of personal service upon the defendant within the state.**—Where one is in fact a non-resident, his property will be liable in a foreign attachment, notwithstanding the fact that the defendant may be in the state at the time it is sued out.[3] Nor will the allegation of non-residence be defeated by the fact that the defendant is personally served.[4] The effect of such personal service will, of course, be to give the court jurisdiction to enter a general judgment and issue an execution, not only against the property attached but generally against the defendant and all of his property.[5]

§ 104. **Effect of non-residence of part of a firm and residence of the others.**—In harmony with what has been already stated regarding the bringing of attachments against copartners and others jointly interested,[6] it may be further stated that the non-residence of one or more of several defendants to a civil action is no ground for attachment against the property of any one of the defendants who is a resident of the state.[7] And as

1. Thompson *v.* Wright, 22 Ga. 607; Slatton *v.* Jonson, 4 Hayw. (Tenn.) 196; Dunn *v.* Myres, 3 Yerg. (Tenn.) 413; Rochereau *v.* Guidry, 24 La. Ann. 311.

2. Succession of Durand, 24 La. Ann. 352.

3. Bryans *v.* Dunseth, 1 Martin (La.), n. s. 412.

4. Jackson *v.* Perry, 13 B. Mon. (Ky.), 231.

5. See as to judgment, *post.*

6. See *ante*, § 47.

7. Mills *v.* Brown, 2 Metc. (Ky.) 404; Duncan *v.* Headley, 4 Bush (Ky.) 45.

But in Kentucky for other causes than non-residence given by one co-defendant, attachment is allowed against other defendants. Duncan *v.* Headley, 4 Bush (Ky.) 45.

The same principle is followed in Mississippi. Cohen *v.* Gamble, 71 Miss. 478, 15 So. Rep. 236.

a general rule an attachment can not be maintained against the partnership while one or more of the partners are present.[1] But if one of several partners is a non-resident such fact will authorize an attachment against him to be levied upon his interest in the partnership property.[2] And under a statute permitting several actions on contracts and liabilities of a partnership, such a foreign attachment may be maintained against a non-resident partner on a partnership debt while the other partners are residents.[3]

§ 105. **Non-resident or foreign corporations.**—What has been said about foreign corporations hereinbefore when considering the question as to who may be sued,[4] is to be considered applicable in this connection and leaves little to be further said. A corporation is to be considered a resident of the state in which its charter was obtained, regardless of the residence of the individual incorporators. A corporation can not migrate although it may do business elsewhere by its agents or servants there residing. A corporation chartered by a foreign state is a foreign corporation and is liable to attachment as a non-resident debtor, although it may have an officer and do business in the state in which the attachment is issued.[5] And a statute providing for the service of summons upon the corporation by other means than by service upon its principal officers does not make of it a domestic corporation so as to give it immunity from foreign attachment.[6]

1. Remington *v.* Howard Ex. Co., 8 R. I. 406; Taylor *v.* McDonald, 4 Ohio 149.

2. McHaeny *v.* Cawthorn, 4 Heisk. (Tenn.) 508.

And it is said in this case when the court has thus acquired jurisdiction for one purpose, it will retain it for others. McHaney *v.* Cawthorn, 4 Heisk. (Tenn.) 508.

3. Cohen *v.* Gamble, 71 Miss. 478, 15 So. Rep. 236.

4. See *ante*, § 84.

5. City of St. Louis *v.* Wiggins, etc., Co., 40 Mo. 580; Bank of Augusta *v.* Earle, 13 Pet. (U. S.) 519; Gill *v.* Kentucky, etc., Co., 7 Bush (Ky.) 635; New Orleans, etc., Co. *v.* Wallace, 50 Miss. 244; Harley *v.* Charleston S. P. Co., 2 Miles (Pa.) 249; Beal *v.* Toby Val. Supply Co. (Pa. Com. Pl.) 2 Pa. Dist. R. 671; Evans *v.* Monot, 4 Jones (N. C.) Eq. 227.

As to the inability of its officers to assemble and transact corporate business beyond the boundary of the state which created it, see Camp *v.* Byrne, 41 Mo. 525.

6. Beal *v.* Toby Val. Supply Co., (Pa. Com. Pl.) 2 Pa. Dist. R. 671.

The organization of two corporations in different states does not merge them into one corporation, even though they have a unity of interest.[1] But when a corporation exists under the acts of two states, having but one capital stock and one set of officers, it is not suable as a foreign corporation in another state.[2]

§ 106. **"Removal of property," and same "with intent," or "to the injury of" the creditor.**—The statutes allowing attachments on the ground of the removal of property are far from uniform. Some provisions are such that the mere removal of property is sufficient ground, on the principle that it will prevent the creditor from obtaining satisfaction of an execution on a possible judgment; others further prescribe that the debtor must be "about" to make the removal, and still others that the removal which he is "about" to make must be "with intent" to hinder and delay creditors, or to defraud creditors. The meaning of the words of the statute "about to remove" sometimes becomes a question of much importance, and the best opinion probably is, that if the purpose is actually entertained in the mind of the debtor, and the scheme is likely to be carried out in one, two, three, or several weeks or months—as soon as he has prepared his affairs for removal—the writ may be taken out. The word "about" must be taken in the common acceptation of the term. It implies that the defendant is soon to do the act complained of. It has a different meaning in a legal sense from the word "will." But it can not be construed to mean that the debtor is preparing and intending to make an *immediate* removal, for that would narrow the meaning of the statute to such an extent that the debtor must be so near to departure before the plaintiff could sue out an attachment that the writ would come too late. The general intent, then, of all the statutes in which the word "about" appears, is this: If, in the first class of cases, the debtor has the present intention of performing the act, and if in the second class the *debtor's*

1. Farnum *v.* Blackstone, etc., Co. 1 Sum. (U. S. Cir. Ct.) 46.

2. Sprague *v.* Hartford, etc., Co., 5 R. I. 233.

purpose is the same, coupled with the design that his creditors may not obtain the satisfaction of his debt, his creditors are entitled to a writ or attachment. Further than this, any attempt to fix a definite rule as to any *time* within which the injury is to be done, would, it is said, be hurtful in practice and might defeat the remedy in meritorious cases. Each case must be judged by its own peculiar circumstances. The leading purpose of all statutes is to enforce the remedy for creditors by proceedings *in rem* against perverse and dishonest debtors. But whatever the statute specifies as the "cause" on which an attachment may rest, must, as a matter of fact, exist.[1]

Where the statute does not prescribe that the removal of the property shall be a removal "with intent," the sole fact of the removal is a sufficient cause.[2] As where a statute provides that an attachment will lie where the debtor "has removed or is about to remove himself or his property out of this state," a debtor who ships his only property that is subject to execution out of the state, is liable to attachment, although he acts in good faith.[3] This rule was applied in a case where one consigned his property to parties without the state for the purpose of raising a fund against which he might draw in the payment of his debts, the debts being due to other persons than the consignees.[4] And in a case where the debtor invested most of his funds in cotton and prepared to ship it, even though there was no showing that the shipment was for a fraudulent purpose.[5] But where the debtor leaves sufficient property subject

1. Myers *v.* Farrell, 47 Miss. 281; Elliott *v.* Kieth, 32 Mo. App. 579; Jackson *v.* Burke, 4 Heisk. (Tenn.) 610.

2. Durr *v.* Hervey, 44 Ark. 301; Stephenson *v.* Sloan, 65 Miss. 407.

3. The debtor's removal into another county so that process of law can not be served upon him in the county in which the debt was contracted, does not furnish a ground for issuing an attachment against his property in Mississippi. Meek *v.* Fox, 42 Miss. 513.

In North Carolina the *intended* removal of a debtor from the state is no ground for attachment. Hale *v.* Richardson, 89 N. C. 62.

4. Lowenstein *v.* Bew, 8 So. Rep. 674, 68 Miss. 265; Stephenson *v.* Sloan, 65 Miss. 407; 4 So. Rep. 342; Crow *v.* Lemon & Gale Co., 69 Miss. 799, 11 So. Rep. 110.

5. Mack *v.* McDaniel, 2 McCrary, (D. C.) 198, 4 Fed. Rep. 294.

to execution to secure the creditor in the collection of his debt, there is no cause for attachment, although the debtor be about to remove the greater portion of his property.[1] And under such a statute it is not necessary to show that either fraud or injury has resulted or would result to the creditor by such removal.[2] And under such a statute a sheriff's return of "not found" to a summons running against the defendant will permit an attachment to issue against the property remaining in the jurisdiction of the court in which the action is pending when the debtor has removed from the state in good faith.[3] And where a statute makes it a ground for attachment that the debtor is removing his property without leaving sufficient to pay his debts, that fact alone is sufficient cause for attachment without showing that there was any intent to cheat, hinder or delay his creditors.[4] And although he is not leaving sufficient to pay *all* his debts, a creditor may, under such a statute, have an attachment, although there be sufficient left to pay *his* debt. And the creditor may prove other debts in order to show that the property was not sufficient to pay them.[5] One may have attachment under such a state, although the property that is being removed is consigned to another creditor of the defendant to be applied on a *bona fide* debt.[6]

1. Montague *v.* Gaddis, 37 Miss. 453; Pickard *v.* Samuels, 64 Miss. 822.

2. Friedlander *v.* Pollock, 5 Coldw. (45 Tenn.) 490.

Under such a statute the averment in the affidavit that the debtor is about to remove a steamboat has been held to be equivalent to an allegation that he is about to remove himself beyond the limits of the state, but this was in a state where the attachment statutes are liberally construed, which is contrary to the general rule. Bunyan *v.* Morgan, 8 Humph. (26 Tenn.) 210.

But the averment that the debtor has removed his live stock is not equivalent to alleging "that he has removed or is removing himself or his property from the state. Craigmiles *v.* Hays, 7 Lea (Tenn.) 720.

3. James *v.* Hall, 1 Swan. (Tenn.) 297.

4. Durr *v.* Hervey 44 Ark. 301.

5. Holliday *v.* Cohen, 34 Ark. 707.

6. Goodbar *v.* Bailey, 57 Ark. 611, 22 S. W. Rep. 568. See "Effect of Honest Purpose," *post*, § 107.

Under a statute making such mere removal of property a ground for attachment, the fact that partnership property is about to be removed will enable a creditor to sustain an attachment, though none of the partners reside in the county if the statute provide for the service of process at the office or agency of the company or copartnership. Ruthven *v.* Beckwith (Iowa), 45 N. W. Rep. 1073; Ruthven *v.* Beckwith, 84 Iowa 715, 51 N. W. Rep. 153.

It has been held in Georgia under a statute making it a ground that "he

Where the statute specifies conjunctive circumstances or conditions as one ground for removal, the existence of one without the other will not be a ground for attachment. Where the ground specified is the "removal of property" with "intent to defraud" or "intent to hinder and delay" or "to the injury of" the creditor, the mere fact of the removal of the property out of the jurisdiction of the court will not be a ground for attachment. It must be accompanied with such intent, and the conjunctive circumstances must be alleged and proved.[1] The actual evil intent to injure the creditor is the gist of the ground for attachment under all such statutes, and not the mere fact of the removal when no injury to the rights of the creditor is contemplated by the debtor.[2] But the mere intent to injure, without the accompanying act designed to carry such intent to an injurious effect, will be no ground for attachment. The two things must concur,[3] and must be shown by the affidavit.[4] It seems that an averment of such intent to injure will not maintain it where it is shown that sufficient property remains from which the creditor may satisfy his demand.[5] But where the testimony of the defendant alone, or together with such of the plaintiff's evidence as is not in conflict with it, shows many pending suits and judgments against the defendant who is about to remove the remaining portion of his property from the state, the intent to injure or defraud is shown.[6] When the conjunctive circumstances which, taken together, make one ground for attachment, can not both be proven, the creditor must rely upon some other alleged ground, for where more

is actually removing out of the county" that an attachment would lie against one not a resident of the state who was passing through the state with his goods. Johnson *v.* Lowry, 47 Ga. 560.

1. Steele v. Dood, 14 Neb. 496; Hunter *v.* Soward, 15 Neb. 215.

2. Durr *v.* Jackson, 59 Ala. 203; Burruss *v.* Trant, 88 Va. 980, 14S. E. Rep. 845.

3. White *v.* Wilson, 10 Ill. (5 Gilm.) 21.

4. Montgomery *v.* Tilley, 1 B. Mon. (Ky.) 155; Clarke *v.* Seaton, 18 B. Mon. (Ky.) 226.

5. McEntee *v.* Aris, 21 N.Y. S. 857, 66 Hun (N. Y.) 635.

6. Weiss *v.* Hobbs, 84 Va. 489, 5 S. E. Rep. 367.

What circumstances do not show such intent, see Stow *v.* Stacy, 9 N.Y. S. 1.

than one ground for attachment is averred in the affidavit, proof of the existence of one of the grounds is sufficient to sustain the attachment.[1]

When a fraudulent intent is averred, the burden of proof upon that question is upon the plaintiff, who may put in evidence the conduct of the debtor, his financial situation and the method of dealing adopted by him on a particular occasion, in order that the jury may infer fraud therefrom; but if the circumstances relied on by the plaintiff are as consistent with an honest purpose as with dishonesty no inference of evil intent will arise.[2] And no fraudulent intent can be inferred where the purpose of the citizen in removing the property is for temporary use alone.[3]

§ 107. (a) **Effect of an honest purpose.**—The statutes which make the "removal of property" a ground for attachment are almost universally construed to mean an injurious, unlawful and permanent removal. The mere temporary removal of property for the use of the owner is not a ground for attachment;[4] nor is the shipment of the goods by the debtor who is engaged in legitimate trade beyond the confines of the state.[5] The shipment of cotton for the honest purpose of trade is lawful and not a ground for attachment;[6] nor is the shipment of cotton without fraudulent intent for the payment of a *bona fide* debt in another state,[7] especially where the debt largely exceeds the value of the cotton.[8] The daily shipment of goods by a dealer is no ground for attachment, although he be financially embarrassed;[9] nor is the *bona fide* removal of goods to a store which is opened in another place; nor is the sale below cost of a few articles, when done for the purpose of increasing custom.[10]

1. Strauss *v.* Abrahams, 32 Fed. Rep. 310.
2. Strauss *v.* Abrahams, 32 Fed. Rep. 310.
3. Montgomery *v.* Tilley, 1 B. Mon. (Ky.) 155.
4. Warder *v.* Thrilkeld, 52 Iowa 134; Friedlander *v.* Pollock, 5 Coldw. (Tenn.) 490.
5. Haber *v.* Nassitts, 12 Fla. 589; Clinch River Mineral Co. *v.* Harrison, (Va.) 21 S. E. Rep. 660.
6. Stewart *v.* Cole, 46 Ala. 646.
7. Rice *v.* Pertuis, 40 Ark. 157. See Durr *v.* Hervey 44 Ark. 301.
8. Lowenstein *v.* Bew, 68 Miss. 265, 8 So. Rep. 674.
9. Hernsheim *v.* Levy, 32 La. Ann. 340.
10. Mack *v.* Jones, 31 Fed. Rep. 189.

Likewise where a seaworthy steamboat is sold, and time given for the payment of the price and it is contemplated by the parties at the time that the steamboat is to be employed in navigation in waters extending beyond the state, a creditor can not have attachment by averring that the debtor is about to remove his property out of the state when there is no allegation of fraud or insolvency.[1]

§ 108. (b) **Traverse of the allegation.**—Since, as before shown,[2] an attachment is justified not by the belief of the affiant of the existence of the fact but by the fact of its existence,[3] the allegations in the affidavit or petition may be sufficient to enable the writ of attachment to issue, and yet not be sufficient to support it if the defendant traverse such allegations. The defendant may do this by motion to quash the writ, or by plea in abatement, or other procedure prescribed by the statute.[4] When this is done, and the trial is had of the issues of fact in a controversy as to the right of attachment, the burden of proving the existence of the ground for attachment rests upon the plaintiff.[5]

Where, however, the allegation of fraud or removal is proven, the burden of proof then rests upon the defendant to show that he has other visible property within the state sufficiently ample to satisfy his debts.[6]

§ 109. (c) **Fraudulent intent of one member of a copartnership.**—Following the general principles of attachment against a copartnership,[7] the fraudulent intent and removal of property by one member of the copartnership is not sufficient

1. Hogan *v.* Carras, 12 La. Ann. 49.

2. See *ante*, § 86.

3. Sublett *v.* Wood, 76 Va. 318.

4. See "Dissolution of Attachment," *post*.

But an affidavit averring that a party is removing and about to remove his property from the state is not met by a plea in abatement averring that the defendant is not removing from the state and is not removing his property. It does not answer the charge that he was *about* to remove his property and will be obnoxious on demurrer. Walker v. Welch, 13 Ill. 674.

5. Strauss *v.* Abrahams, 32 Fed. Rep. 310; Ketchum *v.* Vidvard, 4 Thomp. & C. (N. Y.) 138.

6. Pickard *v.* Samuels, 64 Miss. 822, 2 So. Rep. 250.

7. See *ante*, § 47 *et seq.*

to justify an attachment of the copartnership property.[1] But the knowledge and acquiescence of the other member or members of the firm may give ground for attachment; therefore where it was averred that the debtors were removing the property without the state to defraud their creditors, and it was shown that one of the debtors admitted that the other, his partner, had gone to another state and taken most of the property with him, the court said that he, being aware of his partner's intention and making no effort to prevent him from taking the property, consented to the fraudulent act, thereby rendering both liable in attachment.[2]

§ 110. (d) **Belief of the affiant not sufficient.**—Where the intent of the debtor is an element of the ground for attachment, the statute contemplates the actual existence of the evil intent and not the mere belief of the attaching creditor that such is the fact.[3] And the fraudulent act of the debtor must have accrued before the time of making the affidavit or it must then exist.[4]

§ 111. **Fraudulent disposal, secretion, or conveyance of property.**—The statutes of many states specify as grounds for attachment that the debtor has or is about to dispose of, or conceal or convey his property; some of them enumerating one or more of these causes conjunctively, and generally (but not always) specifying that it must be done "with fraudulent intent" to "hinder or delay creditors," etc., etc. But the letter

1. Bogart *v.* Dart, 25 Hun (N. Y.) 395; Evans *v.* Virgin, 69 Wis. 153 (33 N. W. Rep. 569).

2. Bryant *v.* Simoneau, 51 Ill. 324.

It is not a fraudulent act for partners who reasonably expect to be able to extricate themselves from financial difficulties to use small amounts of the firm assets for individual expenses and the discharge of personal obligations. McKinney *v.* Rosenband, 23 Fed. Rep. 785.

But an attachment may be had against two copartners on a joint demand for goods sold and delivered where one, being insolvent, fraudulently transfers his interest to the other. Hirsch *v.* Hutchison, 64 How. (N. Y) Pr. 366.

3. Wrompelmeir *v.* Moses, 3 Bax. (50 Tenn.1)467; Jackson *v.* Burke, 4 Heisk. (Tenn.), 610; Sublett *v.* Wood, 76 Va. 318. See Dwyer *v.* Testard, 65 Tex. 432.

4. Bumberger *v.* Gerson, 24 Fed. Rep. 257.

of the law is of little importance in a general work like this and we will confine ourselves to the interpretation of the terms used in the statutes.

The term "disposed" alone when used as ground for attachment covers such alienations as pledges, gifts, pawns, bailments and all other transfers which may be effected by mere delivery without the use of any writing, but includes no species of conveyance.[1] Under the clause "fraudulently conveyed, etc., *so as to* hinder or delay his creditors," an attachment may be sustained, it seems, although the conveyance was made without intending to hinder or delay the creditor.[2] But the clause "conveyed, disposed of or concealed, etc., *with intent* to defraud his creditors," requires that such intent must actually exist, and the mere indication or appearance of such intent will not sustain an attachment.[3] The fraudulent act must have accrued before the making of the affidavit or must exist at the time.[4] And the fraudulent intent must be shown before suing out the writ.[5] And when the conveyance is made with the intent to defraud creditors it will make no difference that the conveyance is in itself good as to the creditors secured by it.[6]

In some states an attachment is permitted when a conveyance or concealment of a part of the debtor's property, with intent to defraud creditors, is shown.[7] In Oregon it is ground for at-

1. Bullene *v.* Smith, 73 Mo. 151.

2. Noyes *v.* Cunningham, 51 Mo. App. 194; Pilling *v.* Otis, 13 Wis. 495; Shove *v.* Farwell, 9 Bradw. (Ill. App.(256.

3. Ferguson *v.* Chastant, 35 La.Ann. 339.

But under the statutes of some states an attachment may be sued out on the averment on the ground that the affiant has reason to believe that the debtor will fraudulently dispose of his property before they can obtain judgment against them. Eckman *v.* Munnerlyn, 13 So. Rep. 922, 32 Fla. 367; Bell *v.* Mansfield's Assignee, (Ky.) 13 S. W. Rep. 838; Boyd *v.* Labranche, 35 La. Ann. 285.

4. Bumberger *v.* Gerson, 24 Fed. Rep. 257.

5. Warner *v.* Everett, 7 B. Mon. (Ky.) 262; Flannagan *v.* Donaldson, 85 Ind. 517; Spencer *v.* Deagle, 34 Mo. 455.

6. Enders *v.* Richards, 33 Mo. 598; Stewart *v.* Cabanne, 16 Mo. App. 517.

The affidavit of the fraudulent purchaser may be sufficient to sustain an attachment although the facts stated in the affidavit be not sufficient to sustain an action to set aside the conveyance. National Exch. Bank *v.* Stelling, 31 S. C. 360 (9 S. E. Rep. 1028).

7. Taylor *v.* Myers, 34 Mo. 81. See, also, Illinois Attachment Act, § 6.

tachment that the debtor is about to dispose of them with intent to delay or defraud the plaintiff, regardless of his intention as to his other creditors.[1] And in Arkansas it will be a ground of attachment by any creditor if the debtor makes a sale or conveyance to cheat, hinder or delay any one creditor.[2]

An honest intent of the debtor to apply the proceeds of the property he is conveying or disposing of to the satisfaction of just debts is no ground for attachment under statutes specifying a conveyance with intent to hinder, defraud or delay creditors to be a ground for attachment.[3] And this is true, although by such payment some creditors are preferred to other creditors, if done in a state permitting the preferment of certain creditors.[4]

Whatever the statute may provide as a ground for the issuance of the writ must be made to appear before the writ can issue.[5] If one clause of a statute enumerating the grounds for attachment is "fraudulently concealed," etc., so as to "hinder or delay his creditors," and another clause of the same statute is "fraudulently conveyed or assigned," etc., so as to "hinder or delay his creditors," the allegation of one ground and proof of the other will not sustain an attachment. They are not controvertible clauses; each clause presents a different ground for attachment and the one which is averred must be proven.[6]

When there was actually existing a fraudulent intent on the

1. Haizlette *v.* Lake, Deady (U. S. Dist. Ore.) 469.

2. Sherrill *v.* Bench, 37 Ark. 560.

And the same principle obtains as to other causes of attachment. Sherrill *v.* Bench, 37 Ark. 560.

3. Eaton *v.* Wells, 18 Minn. 410; Holbrook, Merrill & Stetson *v.* Peters & Miller Co., 36 Pac. Rep. 256, 8 Wash. 344; Miller *v.* Wichita Overall and Shirt Manuf'g Co., 53 Kan. 75, 35 Pac. Rep. 799; Gregory Grocer Co. *v.* Young, 53 Kan. 339, 36 Pac. Rep. 713.

4. Iosco County Savings Bank *v.* Barnes, 100 Mich. 1, 58 N. W. Rep. 606.

5. Walker *v.* Haggerty, 20 Neb. 482; Hoyman *v.* Beverstock, 8 Ohio Cir. Ct. Rep. 473; Market Nat. Bank *v.* Bethel, (Cin. Supr. Ct.) 32 Wkly. Law Bul. 135.

Section 227, code civil procedure of Nebraska, provides that where a debtor has sold or disposed of his property to hinder or delay his creditors or is about to do so with that intent, an attachment may issue on a claim not due. This confines the plaintiff to a proof of such ground, and although he may aver another ground for attachment he can not sustain his writ by proof of it. Caulfield *v.* Bittenger, 37 Neb. 542, 56 N. W. Rep. 302.

6. Douglass *v.* Cissna, 17 Mo. App. 44.

part of the debtor at the time he conveyed his property, the intent of the vendee is generally immaterial.[1] But in Indiana, in order to constitute fraud in the conveyance of real estate so as to sustain an attachment, it must be shown to be fraudulent on the part of the purchaser as well.[2]

A fraudulent conveyance or disposal of property within the meaning of the statute prescribing grounds for attachment contemplates such conveyance or disposal of property which would be attachable if other grounds for attachment existed, therefore there can be no fraudulent conveyance or disposal of a debtor's homestead within the meaning of the attachment law;[3] nor of other property exempt from execution.[4]

§ 112. (a) **Acts that have been held sufficiently fraudulent within the attachment law.**—An averment that the creditor was about to dispose of his property with intent to defraud his creditors, was supported by showing that when a member of the firm was refused a loan from a bank to which the firm was already indebted, and when asked to secure such debt told the cashier that the firm had notes, and accounts which it would put into notes, and that they would put them all into their pockets, which fact the cashier reported to the attaching creditor of the firm.[5] And a like averment was supported by showing that the defendant gave its notes for the accommodation of another in a large amount, and that judgment was recovered on such notes by the latter.[6]

An allegation that the defendants have disposed of their property with intent to defraud their creditors will be supported by proof that they were engaged in mercantile business, and being considerably indebted for goods, traded their stock worth $2,000 for incumbered wild lands of questionable value.[7]

1. Miller *v.* McNair, 65 Wis. 452.

2. Johnston *v.* Field, 62 Ind. 377.

Lands conveyed to a non-resident in fraud of creditors may be subjected to the actual owner's debts by service being had by a publication. Keene *v.* Sallanbach, 15 Neb. 200. See as to the "Service of the Writ" *post*, § 200.

3. Davis *v.* Land, 88 Mo. 436.

4. Prout *v.* Vaughn, 52 Vt. 451.

5. Orr & Lindsey Shoe Co. *v.* Harris, 82 Tex. Sup. 273, 18 S. W. Rep. 308.

6. First Nat. Bank of Marietta *v.* Bushwick Chemical Works, 6 N. Y. S. 318.

7. Robinson Notion Co. *v.* Ormsby, 33 Neb. 665, 50 N. W. Rep. 952.

An affidavit stating as ground for attachment that the defendant is disposing of his property with intent to defraud his creditors, is supported by proof that the defendant stopped business, was insolvent, that its manufactured material had been removed, and that its president had directed the removal of the machinery he used and had removed portions thereof to places unknown.[1] And a like averment is supported by showing that when the goods were sold, for the price of which the action was brought, the defendant represented that he was doing a good business and making money; that two weeks thereafter a meeting of creditors was called and a statement made that he could not pay more than twenty-five cents on the dollar; and by an affidavit of his former bookkeeper that shortly before the transaction with the plaintiff, the stock was worth $30,000; that at the time of the call it was apparently of the same value, but that the debtor had said it was only worth $3,000 and that was all the creditors could get out of it.[2]

That the debtor was fraudulently disposing of his goods in a clandestine manner may be shown in evidence against him under an averment that he has absconded, because it is relevant as tending to show the intent of his absence.[3]

When the debtor conveys his property for the purpose of hindering and delaying his creditors, an attachment may be sustained under a statute making it a ground for attachment that he is selling or converting his property "for the purpose of avoiding the payment of his debts," even though he may intend to pay for them ultimately.[4]

§ 113. (b) **Acts that have been held not sufficiently fraudulent within the attachment law.**—If the debtor sell his property for the purpose of obtaining money with which to purchase necessaries for his family, it will not be fraudulent within the meaning of the attachment law, although his creditors

1. McTaggart *v.* Putnam Corset Co., 8 N. Y. S. 800.

2. Strauss *v.* Vogt (Super. N. Y.), 25 N. Y. S. 801, 4 Misc. Rep. 612.

3. Ross *v.* Clark, 32 Mo. 296.

4. Gray *v.* Neill, 86 Ga. 188, 1; Gray *v.* Blackwell, 12 S. E. Rep. 362; Coleman *v.* Neill, 86 Ga. 188.

suffer thereby.[1] But if it be sold to obtain money for future support, when making a general assignment for the benefit of creditors, it will be fraudulent.[2] The sale of property with the honest intention to apply the proceeds to the payment of debts is not fraudulent.[3] Nor is the failure to pay over money which has been collected a "fraudulent concealment."[4]

The averment of a fraudulent disposal of property, and being about to do so, is not supported by proof that some articles were sold below cost, when the same is shown to have been done to attract customers, and the general stock sold at a profit, the business being generally successful;[5] nor was a like averment sustained by showing that the defendant was a company manufacturing woolen cloth and not engaged in selling wool; that the affiant saw a load of wool being shipped away, and was told by the person, not working for the company, who had charge of the wool, that it came from the company's factory, nor even by an admission of the company that it came from its factory;[6] nor was an averment of a fraudulent disposition of property sustained by proof that the defendant had been supplying his brother with goods for a number of years, when the shipments in question were made and entered upon the books in their regular way and notes taken by the defendant in payment, nothing appearing to show that the goods contained in such shipments were not paid for.[7] Neither is evi-

1. Estes *v.* Fry, 22 Mo. App. 80.

2. Vietor *v.* Henlein, 34 Hun (N. Y.) 562.

3. Eaton *v.* Wells, 18 Minn. 410; Lehman *v.* McFarland, 53 La. Ann. 624.

4. Rohan Bros. B. M. Co. *v.* Latimore, 18 Mo. App. 16.

But selling goods and failing to make returns therefor when done "with intent to defraud" is ground for attachment. Powell *v.* Matthews, 10 Mo. 49; Bank of Commerce *v.* Payne, 86 Ky. 446, 8 S. W. Rep. 856.

Therefore, where the defendants had in store for the plaintiff a quantity of coffee with liberty to sell it and pay the plaintiff from the proceeds a certain amount due to him for discounting certain bills of exchange on the security of the coffee, it was no ground for attachment that the defendants used the proceeds of the sale of the coffee in their business. German Bank *v.* Dash, 60 How. (N. Y.) Pr. 124.

5. Mack *v.* Jones, 31 Fed. Rep. 189.

6. Central Nat. Bank *v.* Ft. Ann Woolen Co. (Sup.), 24 N. Y. S. 640; s. c. 27 N. Y. S. 1114; Barker *v.* Ft. Ann Wollen Co. (Sup.), 24 N. Y. S. 640; s. c. 27 N. Y. S. 1114; Central Nat. Bank *v.* Ft. Ann Wollen Co. (N. Y. App.) 37 N. E. Rep. 827.

7. Singer *v.* Lidwinosky, 36 Ill. App. 343.

Where a note is accepted in settle-

dence of great loss in business, during preceding months, proof of fraudulent disposal of goods sold in the regular course of business.[1]

§ 114. (c) **When fraud will or will not be presumed.**—Fraudulent intent is always a question of fact, and will not be presumed when facts and circumstances surrounding the alleged fraud are in any way reconcilable with honesty and fair dealing;[2] nor even where they are as consistent with an honest purpose as with an intention to defraud.[3] But where the defendant's conduct is not reconcilable with any other inference than that he intended to defraud his creditors by the transactions which are shown in evidence, fraud will be established.[4]

Where fraud is alleged in the making of certain deeds, the effect of which is to delay certain creditors, it must be shown to the jury that such intent existed. It will not be presumed.[5] Nor will fraud be presumed from the fact that the debtor, who is largely indebted to his brother, doing business in another state, sold certain goods to him.[6] But where it is shown that the defendant is about to put his property out of his hands without consideration while in debt to plaintiff, fraud will be presumed.[7] And where the creditor is injured by a transaction which is such as might have been designed by one who is indebted beyond the amount of his assets, and who might wish

ment of an open account and taken as absolute payment and extinguishment of the former debt, and an action is thereafter brought upon the promissory note, it will be no ground for the issuance of an attachment that the debtor did several months prior to the execution of the note fraudulently dispose of his property. Hershfield *v.* Lowenthal, 11 Pac. Rep. 173, 35 Kan. 407.

1. Thompson *v.* Dater, 10 N. Y. S. 613.

2. Dempsey *v.* Bowen, 25 Ill. App. 192.

3. Steinwender *v.* Creath, 44 Mo. App. 356.

4. Wildman *v.* VanGelder, 60 Hun 443, 14 N. Y. S. 914.

Fraud can not be conclusively presumed from the fact that one having a reasonable ground to believe himself insolvent purchased goods on credit. The fact of the insolvency is a question for the jury as well as the fraud. Dunlap *v.* Fox, (Miss.) 2 So. Rep. 169.

5. Spencer *v.* Deagle, 34 Mo. 455.

6. Marx *v.* Leinkauff, 9 So. Rep. 818, 93 Ala. 453.

7. Curtis *v.* Hoadley, 29 Kan. 566.

to put his property out of his hands and obtain it again after having induced his creditors to look to the fraudulent vendee for payment, there will be a presumption that the sale which is a part of the transaction is fraudulent.[1]

§ 115. (d) **How the fraud established.**—The intent to defraud which will justify an attachment must be the fair and logical sequence of the facts proved.[2] But it need not be established by direct testimony; it may be gathered from the circumstances. The conduct, actions and financial situation of the debtor, and the method of dealing adopted by him, may be shown, and the alleged intent inferred therefrom; provided, that after a careful examination of all the details such an inference is warranted.[3] But under an allegation that "he is about to remove his property with intent to defraud his creditors," his general character ten years back for fraudulent conduct is not relevant.[4] Nor under a like averment will evidence be competent, even if admissible, which shows that proposals were made to the plaintiff solely for his benefit, with a view to the settlement of the debt, when the same tends to show that the debtor was about to dispose of his property to defraud his creditors, although such evidence might tend to support attachments by other creditors.[5] But a showing that the debtor, a single man, went to Canada, taking most of his property, offering the balance for sale, and telling a creditor that he (the creditor) would be glad if he got his pay, has been held to make out a strong case of intent.[6] The allegation of fraud by one who had been successful and was not in debt, will not be supported by proof that the debtor bought imprudently more than he should have done, especially if the creditors encouraged the imprudence by pressing goods upon him.[7] Nor will

1. Johnston *v.* Ferris, 14 Daly, (N. Y.) 302.
2. Ellison *v.* Bernstein, 60 How. (N. Y.) Pr. 145.
3. Strauss *v.* Abrahams, 32 Fed. Rep. 310; Burgert *v.* Borchert, 59 Mo. 80.
4. Lewis *v.* Kennedy, 3 Greene, (Iowa) 57.
5. Chaffe *v.* Mackenzie, 10 So. Rep. 369, 43 La. Ann. 1062.
6. Rosenfield *v.* Howard, 15 Barb. (N. Y.) 546.
7. Mack *v.* Jones, 31 Fed. Rep. 189.

fraud be established by showing a discrepancy between a statement made to a creditor to secure credit, and the truth concerning his financial condition, as shown by a critical examination of his affairs, if the statement be generally true, and fairly represent his condition.[1]

In order to establish fraud when relied upon as a ground for attachment, it takes as much proof to show the fraud as would be essential to maintain an action based directly upon fraud.[2] Witnesses must state facts within their own knowledge, or where speaking upon information, the source from which the information was derived must be given.[3] If a statute give two causes for attachment based upon fraud, satisfactory proof of the fraud alleged must be made; for the allegation of one and the proof of another will not avail.[4]

§ 116. (e) **The burden of proof.**—In a case where an attachment has been issued upon a ground of fraud alleged in the affidavit and the motion is made to dissolve the attachment, the burden is then upon the plaintiff to prove the fraud on which he relies as ground for attachment.[5] The averment may cause the attachment to issue, but to justify the attachment on the ground of fraud, the intent to defraud must actually exist in the debtor's mind. A mere appearance or indication of it is not sufficient.[6] And it must be established by evidence sufficient to maintain an action based upon fraud.[7]

1. Mack *v.* Jones, 31 Fed. Rep. 189.

2. West Side Bank *v.* Meehan, 20 N. Y. S. 766, 66 Hun (N. Y.) 627.

3. Ellison *v.* Bernstein, 60 How. (N. Y.) Pr. 145; Matter of Bliss, 7 Hill (N. Y.) 187.

4. Douglass *v.* Cissna, 17 Mo. App. 44.

5. McPike *v.* Atwell, 34 Kan. 142; Strauss *v.* Abrahams, 32 Fed. Rep. 310.

6. Ferguson *v.* Chastant 35 La. Ann. 339.

7. West Side Bank *v.* Meehan, 20 N. Y. S. 766, 66 Hun (N. Y.) 627. See, also, *ante*, § 108.

Where a motion has been made to dissolve an attachment and the plaintiff has introduced evidence of fraud, the defendant may show that the property which was alleged to have been disposed of and concealed was exempt from execution or that it did not belong to him, although it was in his possession—as that it was the property of his wife, who gave it to their son. Carver *v.* Chapell, 70 Mich. 49, 37 N. W. Rep. 879.

Or the defendant may show that the homestead which he conveyed to his wife was in exchange for other real property, especially when his as-

§ 117. (f) **Alienation or delivery to wife or child.**—A sale, assignment or delivery of property to a wife or child may be fraudulent when made with an intent to hinder or delay creditors, and will then of course be ground for attachment. But the fraudulent intent will not be presumed from the mere fact of the conveyance. It must be proven in the same manner as any other fact.[1] An attachment was sustained on such an allegation and proof of fraud, where the debtor did not show in evidence one of two deeds to his wife, nor give evidence that it was based on a valid consideration, nor that it was given in good faith.[2] And allowing a husband to take possession of money when the same was coupled with a falsehood as to the purpose for which he took it, has been held to show a fraudulent intent.[3] But an affidavit stating that the debtor had transferred his farm to his wife and gone to one of the western states, and that affiant had been informed by others that the debtor had said he was about to leave the state and settle in Dakota, and that he had written the affiant that he would not pay his debts, did not show a fraudulent assignment, nor a departure from the state with intent to defraud.[4]

An attachment was sustained on the ground of conveyance with fraudulent intent where the debtor sold his estate to his son, and took notes on long credit which he proposed to transfer to his creditors.[5] But where he purchased a piano for his daughter, and presented it to her before the creditor's debt was contracted, there was no fraud in the transaction and no ground for attachment at suit of such creditor.[6]

A transfer by assignment of pension money to the pensioner's wife is not a fraudulent transaction for which an attachment may issue at suit of a creditor.[7]

sets are in excess of his liabilities. Iosco County Sav. Bank *v.* Barnes, 100 Mich. 1, 58 N. W. Rep. 606.

1. See *supra*, § 116.

2. Washburn *v.* McGuire, 19 Neb. 98.

3. Anderson *v.* O'Reilly, 54 Barb. (N. Y.) 620.

4. Taylor *v.* Hull, 9 N. Y. S. 140, 56 Hun (N. Y.) 90.

5. Clark *v.* Smith, 7 B. Mon. (Ky.) 273.

6. Keith *v.* McDonald, 31 Ill. App. 17.

7. Clark *v.* Ingraham, 15 Phila. (Pa.) 646. See further as to "Pension Money," *ante*, § 33.

§ 118. (g) Fraudulent assignment or transfer of property. —Fraudulent assignment of property is allied to fraudulent disposal, secretion or conveyance of property; and, as such, seems to demand separate consideration. The fact that the debtor has, under the advice of counsel, made a regular assignment for the benefit of creditors will not support such an attachment.[1] Nor will it, though void for irregularity in its execution, if made in good faith,[2] even though the effect of such assignment be to delay creditors, if such delay is not unreasonable.[3] When attachment is sought on the ground of fraudulent assignment, the allegations of such assignment should be made positive and not upon information and belief.[4] But where the debtor's previous conduct is ground for attachment on account of fraud, the attachment is none the less valid because the affiant has reason to believe that a general assignment is in preparation.[5]

Proving that an assignment was made before the suit was brought is evidence that the property has been disposed of, but it does not prove the fraudulent character thereof.[6] It will be evidence of fraudulent assignment for the benefit of creditors, to show that the debtor retained the property in his business for nearly a month, without any attempt to carry out the purpose of the assignment.[7] But it will not be evidence of fraud to show that the debtor paid some of his creditors just before making in good faith a general assignment for the benefit of creditors;[8] nor that he, being a banker, notified certain depositors that he was about to do so, and that they withdrew their deposits all on the day the assignment was made,

1. Wearne *v.* France, 3 Wyo. 273, 21 Pac. Rep. 703.

2. Harris *v.* Capell, 28 Kan. 117; Milliken *v.* Dart, 26 Hun (N. Y.) 24; Bickham *v.* Lake (District Ct.), 51 Fed. Rep. 892.

3. Torlina *v.* Trorlicht (N. M.), 21 Pac. Rep. 68; Torlina *v.* Trorlicht (N. M.), 27 Pac. Rep. 794; Hunter *v.* Ferguson, 3 Colo. App. 287, 33 Pac. Rep. 82.

4. Newwitter *v.* Mansell, 14 N.Y. S. 506.

5. Solinsky *v.* Lincoln Sav. Bank, 85 Tenn. 386, 4 S. W. Rep. 836.

6. Meyer & Sons Co. *v.* Black, 4 N. M. 190, 16 Pac. Rep. 620.

7. Roy *v.* Union Mercantile Co., 3 Wyo. 417, 26 Pac. Rep. 996.

8. Hunter *v.* Ferguson, 3 Colo. App. 287, 33 Pac. Rep. 82.

such conduct was not fraudulent, and the statute making an assignment with preference of creditors void, did not apply.[1] It is evidence of the debtor's being about to make a fraudulent assignment, to show that a few days before he represented himself to be solvent with a large surplus, and that soon after he said he was insolvent and wanted to settle at fifty cents on the dollar, threatening to make an assignment preferring other creditors, and that plaintiff would get nothing; and that after the assignment he tried to settle at twenty-five cents on the dollar, and offered to "fix it up" with a certain creditor if he would consent to the compromise; and that before, an assignee was selected to whom the debtor had previously promised to make preferment to the amount of goods bought of him.[2]

§ 119. (h) **Effect of threats to convey, assign, etc.**—It is said that if the debtor is able to pay his debts, and makes a direct threat to cover up his property, or put it out of his hands, or to make an assignment and prefer other creditors in order to prevent a particular creditor from proceeding by law to secure his debt, it will be presumed to be fraudulent within the meaning of the attachment law making a fraudulent intent in the conveyance or assignment a ground for attachment.[3] On the contrary it has been said that a threat to make a preferential assignment is not necessarily a threat to make a fraudulent assignment in a state where preferential assignments are legal.[4] A question of fraudulent intent, is, in connection with

1. Wearne *v.* France, 3 Wyo. 273, 21 Pac. Rep. 703.

2. National Park Bank *v.* Whitmore, 104 N. Y. 297, 10 N. E. Rep. 524. See further Wilkinson, Banks & Co. *v.* Dockery (Miss.), 12 So. Rep. 585; Bicknell *v.* Speir (Com. Pl. N. Y.), 18 N. Y. S. 590.

3. Wilson *v.* Britton, 6 Abb. (N. Y.) Pr. 33; Livermore *v.* Rhodes, 27 How. (N. Y.) Pr. 506; Gasherie *v.* Apple, 14 Abb. (N. Y.) Pr. 64; United States Net and Twine Co. *v.* Alexander (City Ct. N. Y.), 18 N. Y. S. 147; Newman *v.* Kraim, 34 La. Ann. 910; White *v.* Leszynsky, 14 Cal. 165.

An intent to commit a fraud, not carried out, is not generally evidenced by any one unequivocal act but may be inferred from all the circumstances of the case. White *v.* Leszynsky, 14 Cal. 165. See "How Fraud Established," *ante*, § 115.

4. Evans *v.* Warner, 21 Hun (N. Y.) 574; Wilson *v.* Britton, 26 Barb. (N. Y.) 562.

such threat like in all other cases, a question of fact to be determined by the jury who are to consider other acts and surrounding circumstances.[1] And the following is considered to be well in point:

A motion was made to discharge an attachment and the plaintiff offered evidence tending to show that the defendant had made apparently insincere offers to secure the plaintiff's claim and had prevaricated about going to the bank to get money to pay it; that after stating he had assets worth three times his liabilities he threatened that if the plaintiff gave his claim to a lawyer to collect he would make such a disposition of his property that nothing would be realized. The attachment was sustained.[2] But the opinion of a third person that the debtor will do as he threatens to do will not be evidence in support of an alleged ground for an attachment.[3]

§ 120. (i) **Preference of creditors not alone sufficient fraud.**—In the absence of any statute to the contrary, a debtor has a right to make an honest preference of creditors and where, without intending to secure an advantage to himself he assigns, transfers or disposes of property for the purpose of paying *bona fide* debts, he gives no ground for attachment to issue against him, although he thereby prefers some creditors to others.[4] But the preference must have been made solely for the purpose of paying an honest debt, and not with the intention to hinder, delay, or defraud his creditors.[5] For if an in-

1. See *ante*, § 115.

2. Hanks *v.* Andrews, 53 Ark. 327, 13 S. W. Rep. 1102.

3. Evans *v.* Warner, *supra*.

4. Heideman Benoist Saddlery Co. *v.* Urner, 24 Mo. App. 534; Tootle *v.* Coldwell, 30 Kan. 125, 1 Pac. Rep. 329; Abernathy Furniture Co. *v.* Armstrong, 46 Kan. 270, 26 Pac. Rep. 693; DeWolf *v.* Armstrong, 26 Pac. Rep. 1038; Cooper *v.* Clark, 44 Kan. 358, 24 Pac. Rep. 422; Watkins Nat. Bank *v.* Sands, 28 Pac. Rep. 618, 47 Kan. 591; Douglas County Bank *v.* Sands, 28 Pac. Rep. 620, 47 Kan. 596; Dickinson *v.* Benham, 10 Abb. (N. Y.) Pr. 390, 19 How. Pr. 410; Rose *v.* Benton, 13 N. Y. S. 592; National Park Bank *v.* Whitmore, 104 N. Y. 297, 10 N. E. Rep. 524; Seeligson *v.* Rigmaiden, 37 La. Ann. 722; Merchants and Farmers' Bank *v.* McKellar, 11 So. Rep. 592, 44 La. Ann. 940; Miami Powder Co. v. Hotchkiss, 29 Fed. Rep. 767; Foster *v.* Mullanphy Planing-mill Co. 92 Mo. 79, 4 S. W. Rep. 260.

5. Nelson Distilling Co. *v.* Creath, 45 Mo. App. 169.

solvent debtor make intentional misrepresentations to creditors for the purpose of lulling them into a deceptive sense of security and then make an unfair preference, such creditors will be justified in attaching his property.[1]

§ 121. (j) **Confession of judgment not alone sufficient fraud.**—Following the principle underlying the rule above stated, a debtor has a perfect right to confess judgment for the purpose of satisfying *bona fide* creditors, and in doing so he will give no ground for attachment,[2] unless such judgment be confessed with an intent to injure the attachment creditors.[3]

No presumption will arise that a judgment confessed by a debtor is fraudulent even though in favor of the debtor's wife;[4] nor will the fact that an execution issuing on such a judgment has been set aside for informality in the confession, be conclusive evidence of fraudulent intent.[5] But a void judgment by confession is competent evidence that the defendant attempted to hinder and delay other creditors.[6] And fraud in the confession of judgment must be proved in the same manner as in other cases.[7]

§ 122. (k) **Giving a mortgage is not alone sufficient fraud.**—Upon the principle above stated, that a debtor may make an honest preference of creditors where there is no statute to the contrary, a debtor may, in good faith, give a *bona fide* creditor a mortgage to secure his debt and thereby create no ground for attachment against him at suit of another creditor for disposing of his property with the intent to defraud.[8] But if such a

1. Stevens *v.* Helpman, 29 La. Ann. 635.

2. Estes *v.* Fry, 20 Mo. App. 80; Wyman *v.* Wilmarth, 1 S. D. 35, 46 N. W. Rep. 190; Standard Oil Co. *v.* Morrison A. & A. Co., 54 Ill. App. 531.

3. Field *v.* Livermore, 17 Mo. 218; Ross *v.* Roth, (Pa. Com. Pl.) 13 Pa. Co. Ct. R. 14; Flowers *v.* Miller, (Ky.) 16 S. W. Rep. 705; Rainwater *v.* Faconesowich, 29 Mo. App. 26; Jaffray *v.* Nast, 10 N. Y. S. 280; Galle *v.* Tode, 14 N.Y. S. 531; Meyers *v.* Rauch, 4 Pa. Dist. Rep. 333.

4. Thomas *v.* Dickinson, 11 N. Y. S. 436, 58 Hun (N. Y.) 603.

5. Rainwater *v.* Faconesowich, 29 Mo. App. 26.

6. Burr *v.* Mathers, 51 Mo. App. 470.

7. See *ante*, § 115.

8. Britton *v.* Boyer, 27 Neb. 522, 43 N. W. Rep. 356; Hosea *v.* McClure, 42 Kan. 403, 408, 22 Pac. Rep. 317-319; Henry *v.* McClure, 22 Pac. Rep. 319; Wingo *v.* Purdy, 87 Va. 472, 12 S. E.

mortgage be given "with intent" to injure other creditors, it will give ground for attachment.[1]

Rep. 970; Ray *v.* Gore, 41 N. W. Rep. 329; Gore *v.* Ray, 73 Mich. 385; Tenney *v.* Diss, 32 Neb. 61, 48 N. W. Rep. 877.

The recording of a mortgage 15 or 20 minutes before the attachment levy when the same was executed several weeks before is no evidence of fraud. Eby, Dowden & Co. v. Watkins, 39 Mo. App. 27. Nor is the recording, a year before, of a mortgage given to a brother to secure a sum somewhat larger than the debt actually due him. Allen *v.* Fuget, 22 Pac. Rep. 725, 42 Kan. 672. Nor is the fact that a mortgage is given to secure an accommodation endorser. Godbe-Pitts Drug Co. *v.* Allen, 8 Utah 117, 29 Pac. Rep. 881.

1. Buford & George Implement Co. *v.* McWhorter, 21 Pac. Rep. 86, 41 Kan. 262; Hardie *v.* Colvin, 9 So. Rep. 745, 43 La. Ann. 851.

It is sufficient proof of a fraudulent intent to show that the mortgage is given for a greater sum than was owing to the mortgagee, it appearing by the mortgage itself that it is given to secure future advances. Rice *v.* Morner, 64 Wis. 599. Compare Campbell *v.* Jackson, 80 Wis. 48, 49 N. W. Rep. 121. Especially where the mortgage provides that the mortgagee may take possession and sell the goods in due course of trade. Gallagher *v.* Goldfrank, 12 S. W. Rep. 964, 75 Tex. 562.

So is a chattel mortgage, when it is understood that the mortgagor shall retain possession, sell the property in the usual course of trade and apply the proceeds to his own use. Anderson *v.* Patterson, 64 Wis. 557; Cole, Mfg. Co. *v.* Jenkins, 47 Mo. App. 664; Sauer *v.* Behr, 49 Mo. App. 86.

So is a mortgage given without consideration for the purpose of concealing the debtor's interest in land. Taylor *v.* Kuhuke, 26 Kan. 132.

So is a chattel mortgage given by an insolvent debtor to an attorney for services mostly to be rendered in the future at a time when the debtor is harassed by creditors. Shellabarger *v.* Mottin, 47 Kan. 451, 28 Pac. Rep. 199; Broadhead *v.* Mottin, 47 Kan. 451, 28 Pac. Rep. 199; Tootle *v.* Mottin, 47 Kan. 451, 28 Pac. Rep. 199; Lee *v.* Mottin, 47 Kan. 451, 28 Pac. Rep. 199; Schmertz *v.* Mottin, 47 Kan. 451, 28 Pac. Rep. 199; Phelps, Dodge & Palmer Co. *v.* Mottin, 47 Kan. 451, 28 Pac. Rep. 199.

So is a mortgage on property worth $12,000 to secure a debt of $5,300, when the debtor is in failing circumstances. Smith *v.* Boyer, 29 Neb. 76, 45 N. W. Rep. 265.

And so is a void mortgage on an entire stock of drugs and liquors followed by delivery to the mortgagee. First Nat. Bank *v.* Gerson, 32 Pac. Rep. 908, 50 Kan. 589, 591; Westheimer *v.* Gerson, 32 Pac. Rep. 908, 50 Kan. 589, 591; McPike *v.* Gerson, 32 Pac. Rep. 908, 50 Kan. 589, 591; Stickney *v.* Gerson, 32 Pac. Rep. 908, 50 Kan. 589, 591; Rosenberg *v.* Gerson, 32 Pac. Rep. 908, 50 Kan. 589, 591; Vanatta Lynds Drug Co. *v.* Gerson, 32 Pac. Rep. 908, 50 Kan. 591.

But the mere fact that a mortgagee takes possession a few days after the execution of a mortgage on all the property is not of itself evidence of fraud. Pierce *v.* Johnson, 53 N. W. Rep. 16, 93 Mich. 125; Ripon Knitting Works *v.* Johnson, 53 N. W. Rep. 17, 93 Mich. 129; Mack *v.* Johnson, 93 Mich. 129, 53 N. W. Rep. 17; Leonard *v.* Johnson, 93 Mich. 129, 53 N. W. Rep. 17.

To make the giving of a mortgage fraudulent within the meaning of the law, so as to give ground for attachment, the mortgaged property must be such as would otherwise come within the purview of the attachment statutes. Therefore, the giving of a mortgage upon chattels which are exempt from execution can not be alleged by other creditors to be fraudulent, because they have no legal right to such property.[1]

§ 123. (1) **Fraudulent secretion of money and property—Fraudulent statement regarding finances.**—Closely allied to the fraudulent disposal and conveyance of property is the fraudulent secretion of money and property, and the contemplated injury is in this also the controlling element. Where a debtor is solvent, and has no intent to injure or defraud his creditors, the fact that he does not put the proceeds of his business where his creditors may reach it is no ground for attachment.[2]

When the fact that the debtor has "secreted the property," is the ground for attachment named by the statute, it is not necessary that the debtor shall have secreted all his property.[3] It is sufficient if he have secreted "any" single piece of property of any kind, with the intent to defraud creditors, because the single act shows readiness and intent to extend the offense as far as may be necessary to carry out his fraudulent design.[4]

A debtor's representation that he is insolvent, or that he has less money or property than he in fact has, when made with intent to injure the creditor, is such a concealment as to give ground for attachment,[5] unless the money be subsequently applied to the payment of *bona fide* debts.[6]

1. Wyman *v.* Wilmarth, 1 S. D. 35, 46 N. W. Rep. 190.

The same rule applies in any other conveyance of property. See *ante*, § 111.

2. Willis v. Lowry, 66 Tex. 540, 2 S. W. Rep. 449.

3. Weiller *v.* Schreiber, 63 How. (N. Y.) Pr. 491; Taylor *v.* Myers, 34 Mo. 81; Bank of Commerce *v.* Payne, 8 S. W. Rep. 856; Kleine *v.* Nie, 88 Ky. 542, 11 S. W. Rep. 590.

4. Treadwell *v.* Lawlor, 15 How. (N. Y.) Pr. 8.

5. Wachter *v.* Famachon, 62 Wis. 117; Ziegler *v.* Ziegler, 22 N. Y. S. 812, 68 Hun (N. Y.) 177.

6. Keith *v.* McDonald, 31 Ill. App. 17.

But the omission from a statement

The secretion of a large sum of money, for the purpose of defending anticipated proceedings by creditors, has been said to be a fraudulent concealment of money and ground for attachment *as a matter of law*.[1] But fraudulent intent is generally a question of fact for the jury.[2]

§ 124. (m) **Fraudulent disposition of partnership property.** —The general rules governing the attachment of partnership property have been hereinbefore pointed out in the article treating of "What Property or Interest may be Reached,"[3] and it is only intended here to call attention to the fraudulent acts in the disposition of partnership property as a ground for attachment. The general rule seems to be that where partnership property is being disposed of, even by one partner alone, an attachment may be sustained on that ground against the firm.[4] The appropriation of the assets of an insolvent firm by one member to the payment of his individual debts, is a ground for attachment.[5] And it is fraudulent if one member transfers his interest to his copartner when both are insolvent, and an attachment will lie for goods delivered to the firm.[6] It is likewise fraud sufficient to justify an attachment for the members of a firm which makes a general assignment to pay individual creditors from the firm assets, or to reserve money for the future support of their families.[7] But they may purchase present

of liabilities and assets, of a stock of goods, when the creditor is himself able to judge of its value, is not a concealment of the value of the property. Kipling *v.* Corbin, 66 How. (N. Y.) Pr. 12.

The collection of money by a debtor, a firm, who becomes solvent and does not pay it over, coupled with the denial of having received it by one of the firm is not a fraudulent concealment by the firm. Rohan Bros., etc., Co. *v.* Latimore, 18 Mo. App. 16.

1. Mathews *v.* Loth, 45 Mo. App. 455.

2. See *ante*, § 115.

3. See *ante* §§ 47–51.

4. Wilson-Obear Grocer Co. *v.* Cole, 26 Mo. App. 5; Johnson *v.* Laughlin, 7 Kan. 359.

An affidavit is not contradictory which states that one member has absconded, that another is a nonresident and that the firm is fraudulently disposing of its property, etc. Tanner & D. E. Co. *v.* Hall, 22 Fla. 391.

5. Keith *v.* Armstrong, 65 Wis. 225.

6. Hirsch *v.* Hutchison, 64 How. (N. Y.) Pr. 366.

7. Victor *v.* Henlien, 34 Hun (N. Y.) 562. See Victor *v.* Henlien, 33 Hun (N. Y.) 549.

necessaries for their families without committing fraud.[1] It seems, however, that where several persons are jointly liable, as on a promissory note, an attachment can not be justified against one alone on such demand, on the ground that he has fraudulently disposed of his property, unless facts are averred showing that the demand can not be collected of the others; as for example, that they are insolvent, non-resident, or have absconded.[2]

§ 125. **Fraud in contracting the debt.**—Any statute which enumerates as a ground for attachment that the debtor has "fraudulently contracted" the debt, includes within such clause all contracts for the payment of money entered into with the preconceived purpose of avoiding such payment.[3] The purpose of the statute is to reach that class of cases in which a creditor has been deliberately injured by the willful act of the debtor;[4] and does not apply to cases of falsehood merely where the creditor has no expectation of obtaining any financial gain by the creditor's loss.[5]

One who, knowing the insolvent character of his business, makes a statement that he is solvent, and does this for the purpose of obtaining credit, fraudulently contracts a debt within the meaning of the statute.[6] But the bare fact of insolvency at

1. Estes *v.* Fry, 22 Mo. App. 80.

2. Ogilvie *v.* Washburn, 4 Greene (Iowa) 548.

3. Marqueze *v.* Southeimer, 59 Miss. 430; Blackwell *v.* Fry, 49 Mo. App. 638; Warner *v.* Kade, 15 Mo. App. 600; Kahn *v.* Angus, 61 Wis. 264; Strauss *v.* Abrahams, 32 Fed. Rep. 310; Campion Card and Paper Co. *v.* Searing, 47 Hun (N. Y.) 237; Littlejohn *v.* Jacobs, 66 Wis. 600; May *v.* Newman, 95 Mich. 501, 55 N. W. Rep. 364; Wiggin *v.* Day, 9 Gray (Mass.) 97; Buffington *v.* Gerrish, 15 Mass. 156.

4. Young *v.* Cooper, 12 Neb. 610.

5. Rohan Bros., etc., Co. *v.* Latimore, 18 Mo. App. 16; Hosea *v.* McClure, 42 Kan. 403, 22 Pac. Rep. 317, 319; Henry *v.* McClure, 22 Pac. Rep. 319.

Negligence in the performance of provisional services because of which an employer suffers damages is not within the meaning of the statute. Rawlins *v.* Powers, 41 N. W. Rep. 651, 25 Neb. 681. Nor is the misapplication of money which rightfully came into the debtor's hands. Goss *v.* Boulder Co. Comm'rs, 4 Colo. 468.

6. Wachter *v.* Famachon, 62 Wis. 117; Ring *v.* Charles Vogel Paint and Glass Co., 40 Mo. App. 111; Rosenthal *v.* Wehe, 58 Wis. 621.

the time a debt was contracted does not make it fraudulent. It must be incurred with the intent to defraud the creditor.[1]

Likewise one who, though solvent, makes a false financial statement with an intent to deceive, and thereby obtains credit, fraudulently contracts the debt within the meaning of the attachment law.[2]

The false statement need not be made directly to the creditor. One who, intending to establish a false credit, makes material false statements to a commercial agency, and thereby leads another to make a sale to him on credit which he would not have done but for the false statement, fraudulently contracts such debt, and an attachment may be sustained on such ground by such creditor, although he may have no *personal* knowledge of what statements the debtor made.[3] But a false report of the financial condition made to one's banker will not be a ground for attachment at suit of a creditor, when the banker only communicated his opinion in regard to the debtor, and did not communicate the substance of the debtor's statement.[4]

False representations made after contracting the debt, it seems, can not be construed to be within the meaning of the statute,[5] although in one case a circular letter written to creditors soon after the debt was incurred, stating his assets and liabilities and proposing a settlement, was held to be competent evidence on the trial of a plea in abatement, as tending to

1. Miller *v.* Shapiro (Pa. Com. Pl.), 12 Pa. Co. Ct. R. 526, s. c. 2 Pa. Dist. Rep. 356.

As to what must be shown by the affidavit see Miller *v.* Shapiro (Pa. Com. Pl.), 12 Pa. Co. Ct. R. 526; Cole *v.* Aune, 40 Minn. 80, 41 N. W. Rep. 934. See "Affidavit," *post*, § 151.

2. Rosenthal *v.* Wehe, 58 Wis. 621.

3. Emerson *v.* Detroit Steel and Spring Co., 100 Mich. 127, 58 N. W. Rep. 659; Emerson *v.* Spearman, 100 Mich. 127, 58 N. W. Rep. 659; Gries *v.* Blackman, 30 Mo. App. 2.

But such false statements of solvency made in good faith when in fact the debtor was insolvent without knowing it is no ground for attachment. Curtis *v.* Hoxie, 88 Wis. 41, 59 N. W. Rep. 581.

4. Kilpatrick-Koch Dry Goods Co. *v.* McPheely, 56 N. W. Rep. 389, 37 Neb. 800. Compare Reynolds *v.* Horton, 22 N. Y. S. 18, 67 Hun (N.Y.) 122.

5. Marqueze *v.* Southeimer, 59 Miss. 430; First Nat. Bank *v.* Swan, 3 Wyo. 356, 23 Pac. Rep. 743.

show his financial condition and the intent with which the purchase was made from the plaintiff.[1] Where only part of the claim sued upon was contracted because of fraudulent representations, an attachment thereon will be dismissed, because as a debt in gross it was not fraudulently contracted;[2] unless a suit is brought on the running account, some items only of which were fraudulently contracted, in which case (upon the principle that a running account is a debt *in solido*), the attachment will be sustained.[3]

An attachment on the ground of fraud in contracting the debt can, as a matter of course, only be maintained against parties to the fraud. Where the debt fraudulently contracted is assumed by another, an attachment can not be sustained against him on this ground, because such debt was not contracted by him.[4]

The fraud in contracting the debt, like fraud in other cases, is a question of fact to be determined by the jury.[5] There is no presumption either for or against it, and it is error for the court to instruct the jury that the evidence must show that the defendant intended never to pay the debt at the time the contract was made, and that such intention must be presumed not to have existed until proven.[6]

§ 126. (a) **Debt criminally contracted.**—A few statutes make it a ground for attachment that the debt was "fraudulently or *criminally* contracted," but such attachment must issue "in a civil action for the recovery of money," though the liability be criminally incurred.[7] And when a statute is

1. Gries *v.* Blackman, 30 Mo. App. 2.

2. Strasburger *v.* Bachrach, 13 N. Y. S. 538, 59 Hun (N. Y.) 624; Estlow *v.* Hanna, 42 N. W. Rep. 812, 75 Mich. 219; Stiff *v.* Fisher, 2 Tex. Civ. App. 346, 21 S. W. Rep. 291; Stiff *v.* Stevens, 21 S. W. Rep. 295; C. D. Smith Drug Co. *v.* Casper Drug Co., (Wyo.) 40 Pac. Rep. 979.

3. Mackey *v.* Hyatt, 42 Mo. App. 443.

4. Chapell *v.* Comins, 25 Pac. Rep. 216, 44 Kan. 743.

5. See *ante*, § 115.

6. Marks *v.* Stoner, (Miss.) 11 So. Rep. 186.

7. Sturdevant *v.* Tuttle, 22 Ohio St. 111; Creasser *v.* Young, 31 Ohio St. 57.

An action for the recovery of unliquidated damages for assault and battery is such a civil action for the recovery of a debt criminally contracted, and words charging an assault and battery will be sufficient to

passed permitting such an attachment, it may be sued out in a civil action thereafter begun, although the liability was incurred by a criminal act committed before its enactment.[1]

show that it was criminally incurred. Creasser *v.* Young, 31 Ohio St. 57.

And under such a statute an attachment will lie where the cause of action arose by a rape committed upon the plaintiff's daughter. Kuehn *v.* Paroni, 20 Nev. 203, 19 Pac. Rep. 273.

But a malicious prosecution is not an obligation coming within the meaning of the statute. Glidden & Joy Varnish Co. *v.* Joy, 8 Ohio Cir. Ct. R. 157.

1. Kuehn *v.* Paroni, 20 Nev. 203, 19 Pac. Rep. 273.

CHAPTER VII.

THE AFFIDAVIT.

§ 127. Purpose and necessity of affidavit.
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§ 127. Purpose and necessity of affidavit.—Attachment is a proceeding that is unknown to the common law.[1] It is wholly the creation of the statute law,[2] in derogation of the common law, and it is not favored by the courts. The courts have no general jurisdiction in attachment cases, but only such special

1. See *ante*, §§ 1 and 2, "Origin and Nature of the Remedy."

2. See *ante*, § 8.

and limited jurisdiction as is given by statute, and this jurisdiction can only be obtained by proceeding in the particular manner prescribed. There is no presumption, ever, in cases of statutory jurisdiction. The true principle is, that where the statute confers on a tribunal a special power, to be exercised under particular circumstances and in a particular manner, it is indispensable to the valid exercise of that power that such circumstances exist at the time, and that the court proceed in the exact manner prescribed.[1] Jurisdiction to proceed against the property of a debtor by the summary process of attachment is such a special power, and it can only be maintained by a compliance with the requirements of the statute.[2] Therefore there must be such circumstances or state of things existing at the time as the law designates to be a cause of action; and such cause of action must be stated affirmatively in the affidavit,[3] in all cases.[4] The validity of the judgment in attachment is determined by the facts alleged in the affidavit,[5] and by the strict compliance with the prerequisites prescribed by the statute.[6] A statement on oath is an essential prerequisite,[7] and a judgment without such affidavit is void,[8] and will be set aside.[9] Furthermore the officer who makes an attachment without proof on oath having been made, renders himself liable as a trespasser.[10] And although there be a preliminary

1. Sears *v.* Terry, 26 Conn. 273.

A court of limited jurisdiction must show the source of its jurisdiction on the face of the proceeding. Shivers *v.* Wilson, 5 Harris & J. (Md.) 130.

2. Eads *v.* Pitkin, 3 Greene (Iowa) 77.

An attachment is not justified by the *belief* of the affiant in the existence of a fact, but by the *fact* of its existence. Sublett *v.* Wood, 76 Va. 318; Foster *v.* Illinski, 3 Ill. App. 345.

3. Hale *v.* Chandler, 3 Mich. 531; Wight *v.* Warner, 1 Doug. (Mich.) 384.

4. Van Kirk *v.* Wilds, 11 Barb. (N. Y.) 520.

5. Devries *v.* Summit, 86 N. C. 126; Capehart *v.* Dowery, 10 W. Va. 130.

6. Earthman *v.* Jones, 2 Yerger (Tenn.) 484.

7. Worstell *v.* Ward, 1 Bush (64 Ky.) 198; Greenvault *v.* Farmers,' etc., Bank, 2 Doug. (Mich.) 498; Bond *v.* Patterson, 1 Blackf. (Ind.) 34.

8. Calk v. Chiles, 9 Dana (Ky.) 265; Kerr *v.* Smith, 5 B. Mon. (Ky.) 552; McGown *v.* Sprague, 23 Ala. 524; Kirksey *v.* Fike, 27 Ala. 383.

9. Manley v. Headley, 10 Kan. 88; Erwin v. Commercial, etc., Bank, 3 La. Ann. 186; Clark *v.* Roberts, 1 Ill. (Breese) 285; Stewart *v.* Mitchell, 10 Heisk. (66 Tenn.) 488; De Leon *v.* Heller, 77 Ga. 740.

10. Vosburgh *v.* Welch, 11 Johns. (N. Y.) 175.

Some courts hold that attachment

affidavit, if it does not conform to the requirements of the statute, the proceedings will be void.[1] That is to say, if the affidavit be defective in substance by failing to make the necessary allegations, or if it be false,[2] the court will acquire no jurisdiction and the proceedings by such court will be void.[3] But as to certain informalities and irregularities, when it is otherwise sufficient to confer jurisdiction, it may be amended.[4]

An affidavit as a foundation for beginning a suit in attachment[5] to confer jurisdiction upon the court, must state a fact

without affidavit should be quashed on motion. McReynolds *v.* Neal, 8 Humph. (Tenn.) 12; Skinner *v.* Beshoar, 2 Col. T. 383. Others that it should be by a plea in abatement. Jones *v.* Pope, 6 Ala. 154; Johnston *v.* Hannah, 66 Ala. 127; Wright *v.* Smith, 66 Ala. 545; Messner *v.* Hutchins, 17 Tex. 597; Graham *v.* Bradbury, 7 Mo. 281, And still others by plea in bar. Starbuch *v.* Murray, 5 Wend. (N. Y.) 148; Shumway *v.* Stillman, 4 Cowan (N.Y.) 292. And still others that the objection may be made at any time by motion to quash before or after plea, by demurrer; by prayer for instruction from the court after swearing the jury; after verdict on motion to arrest; or even after judgment (without objection in the court below) upon writ of error assigning want of jurisdiction as error. Bruce *v.* Cook, 6 Gill & J. (Md.) 345; Coward *v.* Dillinger, 56 Md. 59. See "Dissolution of Attachment," *post*, § 326.

1. Mathews *v.* Densmore, 43 Mich. 461; Cross *v.* McMaken, 17 Mich. 511; Wells *v.* Parker, 26 Mich. 102; Galloway *v.* Holmes, 1 Doug. (Mich.) 330; Beach *v.* Botsford, 1 Doug. (Mich.) 199; Greenvault *v.* F. and M. Bank, 2 Doug. (Mich.) 498; Hale *v.* Chandler, 3 Mich. 531; Whitney v. Brunette, 15 Wis. 61; Bowen *v.* Slocum, 17 Wis. 181; Conrad *v.* McGee, 9 Yerger (Tenn.) 428; Marx *v.* Abramson, 53 Tex. 264.

2. Murphy *v.* Montadam, 2 Idaho 1048, 29 Pac. Rep. 851.

3. Whitney *v.* Brunette, 15 Wis. 67; Wilson *v.* Arnold, 5 Mich. 98; *In re* Faulkner, 4 Hill (N. Y.) 598; *Ex parte*, Haynes, 18 Wend. (N. Y.) 611; Smith *v.* Luce, 14 Wend. (N. Y.) 237; Cadwell *v.* Colgate, 7 Barb. (N. Y.) 253; Miller *v.* Brinkerhoff, 4 Denio (N. Y.) 118; Kennedy *v.* Dillon, 81 J. J. Marsh. (Ky.) 354; McCullough *v.* Foster, 4 Yerger (Tenn.) 162; Saunders *v.* Cavett, 38 Ala. 51.

4. See *post*, §131, "Formal part of the Affidavit" and § 152, "Amendments of Affidavit."

In a few states attachment suits are begun by *petition*, and the general rule in such cases is, that where the petition sets forth sufficient grounds, and is sworn to, it alone is sufficient and the affidavit is then unnecessary. Burnam *v.* Romans, 2 Bush (Ky.) 191; Scott *v.* Doneghy, 77 B. Mon. (Ky.) 321; Maddox *v.* Fox, 8 Bush (Ky.) 402; Huffman *v.* Hardeman, (Tex.) 1 S. W. Rep. 575; Shirley *v.* Byrnes, 34 Tex. 625; Wirt *v.* Dinan, 44 Mo. App. 583. However, the petition can not be dispensed with in such cases, a mere affidavit setting forth facts is *proof* and not *pleading* and is not sufficient. Garrett *v.* Taylor, 14 S. E. Rep. 869, 88 Ga. 467.

5. As to "Attachment in Suits Already Begun" and "Ancillary Attachment," see *post*, §§ 192 and 215.

which will give the plaintiff cause of action in *indebitatus assumpsit*,[1] and must further state facts and circumstances giving *ground for bringing attachment* to enforce such money demand.[2]

There is a rule of law which states that a process which is regular on its face and has been issued by a court having jurisdiction of the subject-matter will protect the officer serving the writ. But this is a rule of protection only, and while such a writ for attachment may protect the officer from liability in making the levy, it can not be made the foundation of a right or claim against others and no rights of property can be acquired under it.[3] Where several orders of attachment are issued at the same time, or in succession, only one affidavit is necessary.[4]

§ 128. **When it should be made.**—The incipient steps in the attachment should be made as nearly cotemporaneous as conveniently may be, so that suspicion be not thrown upon the plaintiff's case. There should not be such delay as to afford a presumption that the facts stated in the affidavit have ceased to exist.[5] Yet, where the allegations contained in the affidavit are of some matter subject to change, a lapse of intervening time between the making of the affidavit and the issuing of the writ is, of itself, not sufficient to compel the discharge of attachment.[6] It need not be made at the precise time,[7] but may be made a reasonable time before issuing the writ.[8] An

1. See *post*, § 133, "Averment of Indebtedness."

2. Greenway *v.* Mead, 26 N. J. L. 303; Smith *v.* Luce, 14 Wend. (N.Y.) 237; *Ex parte* Haynes, 18 Wend. (N.Y.) 611; *In re* Faulkner, 4 Hill (N.Y.) 598; *In re* Bliss, 7 Hill (N. Y.) 187; Hale *v.* Chandler, 3 Mich. 531; Wight *v.* Warner, 1 Doug. (Mich.) 384; Cooper *v.* Frederick, 9 Ala. 738; Black *v.* Brisbin, 3 Minn. 360; Morgan *v.* House, 36 How. (N. Y.) Pr. 326.

3. Earl *v.* Camp, 16 Wend. (N. Y.) 562; Watkins *v.* Wallace, 19 Mich. 57–74; Le Roy *v.* E. Sag. City Ry. Co., 18 Mich. 233; Beach *v.* Botsford, 1 Doug. (Mich.) 199; Ortman *v.* Greenman, 4 Mich. 291.

4. Thompson *v.* Stetson, 15 Neb. 112.

In this case the affidavit was made March 6th, and the last attachment issued June 30th, following. But see the rule in Michigan as to "When It Should Be Made," *post*, § 128.

5. Campbell *v.* Wilson, 6 Tex. 379.

6. Adams *v.* Lockwood, 30 Kan. 373; Ferguson *v.* Smith, 10 Kan. 396.

7. Creach *v.* Delane, 1 Nott & McCord (S. C.) 189.

8. Foster *v.* Illinski, 3 Brad. (Ill. App.) 345.

Eleven days in this case was held to be unreasonable. Foster *v.* Illinski, 3 Brad. (Ill. App.) 345. Compare Mojarrieta *v.* Saenz, 80 N. Y. 547.

affidavit of "passed due" indebtedness made on the fifth of the month and not filed until the sixteenth has been held to be sufficient because there is a presumption of law that it is still due and unpaid, when no showing is made to the contrary.[1] And an affidavit of "non-residence" filed in a Texas court on the third of July was held to be sufficient when the same was made in New York on the ninth of June, the court saying there was no room to suspect that the affidavit was not true when filed.[2] And an affidavit made by two different attorneys, one as to the indebtedness and the other as to the grounds of attachment, with an interval of four days, is held to be sufficient, the difference being too small to invalidate the proceedings.[3]

In Michigan, by force of a particular statute, no more than one day shall intervene between the date of the *jurat* and the issuance of the writ; but since the time does not begin to run until the expiration of the day upon which the affidavit is executed the writ may issue on the day after the intervening day.[4]

The law contemplates that the affidavit shall be made before the writ can issue, but where, as a matter of fact, both bear the same date, the affidavit will be presumed to have been made first by virtue of the rule that where two acts are done at the same time that will take effect first which ought in strictness to have been done first in order to give it effect.[5]

§ 129. **By whom to be made.**—The general rule is that the affidavit for instituting a proceeding by attachment must be made by the plaintiff himself or by his authorized agent or

1. O'Neil *v.* N. J. & S. P. Mining Co., 3 Nev. 141.

2. Wright *v.* Ragland, 18 Tex. 289.

3. Lewis *v.* Stewart, 62 Tex. 352.

4. Horton *v.* Monroe, 57 N. W. Rep. 109, 98 Mich. 195.

An affidavit made in another state on the same day a bond is executed has been held to be sufficient in Missouri. Avery *v.* Good, 114 Mo. 290, 21 S. W. Rep. 815.

5. Hubbardston L. Co. *v.* Covert, 35 Mich. 254.

As to the time when an affidavit shall be made to procure the issuance of a writ of attachment in suits already begun, see *post*, § 215; Pulliam *v.* Aler, 15 Gratt. (Va.) 54.

attorney in his behalf.[1] But in a few states it must be made by the plaintiff himself, and in a few others, where the plaintiff is present, it must be made by him, and where he is absent such fact must be shown or some excuse given for not producing the affidavit of plaintiff, before an affidavit made by an agent properly authorized will sustain the writ.[2] And whenever made by an agent it must be made by one having knowledge and authority.[3] One who has the general charge and supervision of another's business is generally deemed to have sufficient personal knowledge to make an affidavit in attachment for the collection of a debt to such other person.[4] A cashier and assistant cashier or clerk of a bank is a proper agent, and actual knowledge of the facts set forth may be presumed by the positive terms of the affidavits.[5]

1. Manley *v.* Headley, 10 Kan. 88; Weaver *v.* Roberts, 84 N. C. 493.

If the affidavit in a suit already begun be made by the plaintiff it need not recite that fact, if it is made by the person who signed the petition. Gilkeson *v.* Knight, 71 Mo. 403.

In Virginia prior to 1806 the affidavit had, of necessity, to be made by the plaintiff. Mantz *v.* Hendley, 2 Hen. & Munford (Va.) 308.

In New Jersey, under such a requirement, it must state that the affiant is a creditor of the defendant. Frisby *v.* Williamson, 16 N. J. L. 61.

2. Stewart *v.* Clark, 11 La. Ann. 319; Gribbon *v.* Ganss, (Sup.) 18 N. Y. S. 608; Raymond *v.* Ganss, (Sup.) 18 N. Y. S. 609; also Pool *v.* Webster, 3 Metc. (Ky.) 278; Gribbon *v.* Back, 35 Hun (N. Y.) 541; McVicker *v.* Campanini, 2 N. Y. S. 577.

3. See *post*, § 143 and § 144; Flake *v.* Day, 22 Ala. 132; Beer *v.* Hooper, 32 Miss. 246; Murray *v.* Cone, 8 Port. (Ala.) 250; to the contrary, Didier *v.* Kerr, 12 Gill & J. (Md.) 499; Mantz *v.* Hendley, 2 Hen. & M. (Va.) 308.

As to what averments will show authority of an agent, see Pool *v.* Webster, 3 Metc. (Ky.) 278; Wetmore *v.* Daffin, 5 La. Ann. 496; Lithgow *v.* Bryne, 17 La. Ann. 8; Willis *v.* Lyman, 22 Tex. 268. Smith *v.* Victorin, 56 N. W. Rep. 47, 54 Minn. 338; Hardenberg *v.* Roberts, (S. Dak.) 61 N. W. Rep. 1128.

A general agent who has been particularly instructed to place the claim in the hands of a lawyer for collection may make the affidavit in the principal's name. Allen *v.* Champlin, 32 La. Ann. 511.

But an affidavit made by an agent stating that the sum demanded is due over and above all counter-claims, discounts and set-offs existing in the favor of the defendant to the knowledge of the plaintiff himself is essential. (Davis, P. J., dissenting). Murray *v.* Hankin, 65 How. (N. Y.) Pr. 511.

4. Gribbon *v.* Ganss, (Sup.) 18 N. Y. S. 608; Raymond *v.* Ganss, (Sup.) 18 N. Y. S. 609; Bates *v.* Pinstein, (N. Y.) 15 Abb. N. C. 480.

5. National Park Bank *v.* Whitmore, 40 Hun (N. Y.) 499; American Exchange Bank *v.* Voisin, (N. Y.) 44 Hun 85; Trenton Banking Co. *v.* Haverstick, 11 N. J. L. 171.

In the absence of any showing to

The same rule applies to attorneys; and affidavits made by them are in general sufficient, if they show the necessary facts.[1] Where a suit has already been begun and an attachment process is deemed to be requisite, the attorney of record in the case would seem to be authorized to make the necessary oath if he have knowledge of the facts.[2] But it seems not to be sufficient when made by him partly on information and belief.[3] The affidavit of an attorney of a non-resident creditor stating that the debtor is also a non-resident has been held to be sufficient.[4] Where the affidavit of an attorney states that the facts are better known to him than to the plaintiff and that he knows them to be true, it will be sufficient.[5] But it is not necessary under the Ohio code that the attorney should show that the facts were within his personal knowledge, nor that the plaintiff shall show why the affidavit was not made by the party himself.[6] Nor is the affidavit of an attorney fatally defective in

the contrary a recital that "plaintiff's acting secretary, A B, being duly sworn, upon oath says," etc., is sufficient without any statement that the affidavit was made "on behalf of" the plaintiff. Fremont Cultivator Co. *v.* Fulton, 103 Ind. 393.

1. Flake *v.* Day, 22 Ala. 132; James *v.* Richardson, 39 Hun (N. Y.) 399.

Generally an affidavit made by plaintiff's attorney, or by an attorney in fact, whose power of attorney is filed in the case, is sufficient. Simon *v.* Johnson, (Pa.Com. Pl.) 7 Kulp,166.

2. Hardie *v.* Colvin, 9 So. Rep. 745, 43 La. Ann. 851.

3. Brown *v.* Massman, 71 Ga. 859.

In New York it is sufficient excuse for presenting an affidavit made by the attorney instead of the plaintiff himself, if the plaintiff be out of the state and the affiant believe that the defendant's attachable property will be removed from the state before an affidavit can be obtained from the plaintiff himself. Murphy *v.* Jack, 27 N. Y. S. 802, 76 Hun (N. Y.) 356.

But in New Jersey such an affidavit must state that the plaintiff is absent; though if it do not it is merely irregular and not void and can be avoided only by direct proceedings. Westcott *v.* Sharp, 50 N. J. Law 392, 13 Atl. Rep. 243.

The Kentucky code, which permits an affidavit to be made by an agent when the plaintiff is absent from the county intends an agency existing at the time the affidavit is filed and not a subsequent ratification of a then unauthorized agent or attorney. A motion to quash will maintain in such a case. Johnson *v.* Johnson, 31 Fed. Rep. 700. And in that state a petition purporting to be statements of the plaintiff containing a verification by the attorney which states that the plaintiff is absent from the county may be used as an affidavit. Clark *v.* Miller, 88 Ky. 108, 10 S. W. Rep. 277.

4. Mitchell *v.* Pitts, 61 Ala. 219.

5. Rausch *v.* Moore, 48 Ia. 611.

6. White *v.* Stanley, 29 Ohio St. 423.

Nebraska because it avers that "he" has commenced the action.[1] But generally an attorney who is merely accustomed to attend to another attorney's business during his absence is not, in the absence of special authority, the agent or attorney of the other in such a sense that he may make the affidavit necessary for an attachment.[2]

In a few states the statutes do not require that the affidavit be made by the plaintiff, or his agent, or attorney, but permit it to be made by any person having knowledge of the facts, and when they so permit it to be made, there is no necessity of describing the affiant as the plaintiff's agent.[3] In the absence of any statutory provisions for the appointment of agents or attorneys, for the purpose of suing out attachments, any one authorized by the plaintiff to collect the debt may make the requisite affidavit as one of the incidents of his authority.[4] And when it is permitted to be made by "any credible person," it need not state that the affiant is a credible person, for that will be presumed until the contrary appear.[5]

In Mississippi the affidavit may be made (and the bond given) by the person for whose use an attachment is sued out in the name of another person.[6]

When the statute regulating the affidavit in attachment proceedings authorizes it to be made by "an attorney," it will be satisfied if one attorney verify some of the essential facts, and another attorney other facts; provided the two affidavits taken together cover all the necessary points. For example: one attorney may make affidavit of the indebtedness and another attorney make affidavit of the grounds of the attachment.[7]

1. Jansen *v.* Mundt, 20 Neb. 320.

2. Johnson *v.* Johnson, 31 Fed. Rep. 700.

Nor will a ratification subsequent to the issue of the writ cure the irregularity. Johnson *v.* Johnson, 31 Fed. Rep. 700.

3. Benn v. Hatcher, 81 Va. 25; *Ex parte* Robinson, 21 Wend. (N. Y.) 672.

4. Derring & Co. *v.* Warren, 1 S. D. 35, 44 N. W. Rep. 1068.

5. Ruhl *v.* Rogers, 29 W. Va. 779, 2 S. E. Rep. 798; Delaplain *v.* Rogers, 29 W. Va. 783, 2 S. E. Rep. 800.

6. Grand Gulf Railroad and Banking Co. *v.* Conger, 17 Miss. (9 Smed. & M.) 505.

7. Lewis *v.* Stewart, 62 Tex. 352.

But if two entire affidavits are made one will be treated as surplusage.[1]

Where a statute requires that the affidavit must be made by the plaintiff *or some one in his behalf*, an affidavit made by some one other than the plaintiff himself, which does not show that it was made in his behalf, will be fatally defective.[2] A mere recital, as "A, on behalf of B, being duly sworn," etc., is insufficient.[3] The affidavit is void if it does not identify the plaintiffs.[4] Where, however, the affidavit is made by one stating that he is the plaintiff's attorney, the legal inference will be that he made it "on behalf of the plaintiff." The plaintiff, though not named in the affidavit, will be sufficiently identified by annexing the writ thereto.[5] Furthermore an affidavit made "in behalf of the plaintiff" will be presumed to have been made by his agent or attorney in the absence of a showing to the contrary, the statute not requiring a sworn statement that the affidavit is made by his agent or attorney.[6]

In some states it is not necessary that the affidavit disclose who the plaintiff is, or even that the affiant is the agent of the plaintiff;[7] or even that it is made on behalf of the plaintiff.[8] But the general rule is that the character of the affiant must be shown, yet if the statute does not require the averment under oath that the affiant is such agent or attorney, it may be shown by way of recitation in the affidavit.[9] A few states hold that

1. Wharton *v.* Conger, 9 Smed. & M. (Miss.) 510; Borland *v.* Kingsbury, 65 Mich. 59.

2. Kingsbury *v.* Borland, (Mich.) 31 N. W. Rep. 620.

3. Miller *v.* Chicago, Milwaukee, etc., Ry. Co., 58 Wis. 310.

4. Burnside *v.* Davis, 65 Mich. 74, 31 N. W. Rep. 619.

Where the affidavit showed that the covenants, for the breach of which the action was brought, were made with one who styled himself the agent of the plaintiff and who executed the instrument in his own name, without reference to the plaintiff, the attachment was dissolved on the ground that the action could not be supported in the name of the plaintiff. Downing *v.* Philips, 4 Yeates (Pa.) 275.

5. Stringer *v.* Dean, 27 N. W. Rep. 886, 16 Mich. 196.

6. Fremont C. Co. *v.* Fulton, 103 Ind. 393.

7. Robinson *v.* Hesser, 4 N. M. 144, 13 Pac. Rep. 204.

8. Simpson *v.* McCarty, 20 Pac. Rep. 406, 78 Cal. 175; White *v.* Stanley, 29 Ohio State 423; Grollman *v.* Lipsitz, (S. Car.) 21 S. E. Rep. 272.

9. Murray *v.* Cone, 8 Porter (Ala.) 250; Evans *v.* Lawson, 64 Tex. 199; Adams *v.* Kellogg, 29 N. W. Rep. 679, 63 Mich. 105; Wetherwax *v.* Paine, 2 Mich. 555.

if the character of the affiant is not disclosed, the affidavit will be insufficient;[1] and that the court will not look to other parts of the record to find out who the affiant is.[2] Others hold that it will be sufficient, if it appear from the record,[3] and that such defect in the affidavit is merely a formal one and may be amended when objected to in the trial court.[4]

When an affidavit is made by an agent or attorney, the rule, under some statutes, is, that he must state the source of his information.[5] Under such a rule, an affidavit, made by plaintiff's agent, stating that deponent is familiar with the transaction in question, and that plaintiff is entitled to recover the sum sued for "over and above all off-sets and counter-claims," is sufficient without stating that the facts in regard to the counter-claim "are known to the plaintiff."[6] But as a modification of this rule it is held, under a special statute to that effect, that an affidavit, made by the attorney or agent of the plaintiff, which states positively the amount due, need not state the means of the affiant's knowledge thereof.[7] But an affidavit made by the plaintiff's attorney, though positive in form, is insufficient where it states that the affiant's information was obtained from letters written by plaintiff and from a sworn statement of account in affiant's possession, or that affiant's knowledge is derived from statements made by the plaintiff and his agents.[8] In Georgia, when an agent makes the affidavit he must state positively the grounds for the attachment, but he may state the amount of the indebtedness to the best of his belief.[9] There-

1. Wiley *v.* Aultman, 53 Wis. 560; Wetmore *v.* Daffin, 5 La. Ann. 496.

2. Willis *v.* Lyman, 22 Tex 268.

3. Irwin *v.* Evans, 92 Mo. 472; Mackey *v.* Hyatt, 42 Mo. App. 443.

4. Mackey *v.* Hyatt, 42 Mo. App. 443; Rutledge *v.* Stribling, 26 Ill. App. 353; Tracy *v.* Gunn, 29 Kan. 508.

5. Buhl *v.* Ball, 41 Hun (N. Y.) 61; Marine Nat. Bank *v.* Ward, 35 Hun (N.Y.) 395; Smith *v.* Arnold, 33 Hun (N.Y.) 484; Cribben *v.* Schillinger, 30 Hun (N. Y.) 248.

And when it fails to so state, the court, on the hearing of a motion to vacate the attachment because of such defect, is without power to allow an amendment. Buhl *v.* Ball, 41 Hun (N. Y.) 61.

6. Billwiller *v.* Marks, (City Ct. N. Y.) 16 N. Y. S. 541, 21 Civil Proc. Rep. 162; Barstow Stove Co. *v.* Darling, 81 Hun, 564, 30 N. Y. S. 1031.

7. Anderson *v.* Wehe, 58 Wis. 615; Rice *v.* Morner, 64 Wis. 599.

8. Streissguth *v.* Reigelman, 75 Wis. 212, 43 N. W. Rep. 1116; Trautmann *v.* Schwahlm, 50 N. W. Rep. 99, 80 Wis. 275.

9. Stowers *v.* Carter, 28 Ga. 351.

fore an affidavit made by an attorney, who swears, to the best of his knowledge, that the party is indebted, in a certain amount to the firm for which he is attorney, and further swears to the grounds of attachment, setting them forth in the language of the statute, is sufficient to support a writ.[1]

An affidavit for attachment signed in the name of a firm is insufficient, and the writ of attachment issued thereon can not be sustained.[2] It should be made by an individual member of the firm.[3] An affidavit made by one partner residing in New York for an attachment against the property of a non-resident debtor of the firm is sufficient although the subsequent pleadings show that his copartner was also a non-resident.[4] But under the code of Georgia, an attachment issued in the name of a copartnership will not be dismissed for failure to set out the names of the individuals composing the firm.[5]

§ 130. Before whom to be made.—It may be stated, as a general rule, that the affidavit for attachment may be made before any officer authorized by the laws of the state to administer oaths.[6] It is not necessary that the affidavit be made

1. Gazan *v.* Royce, 78 Ga. 512, 3 S. E. Rep. 753.

2. Norman *v.* Horn, 36 Mo. App. 419. See Fortenheim *v.* Claflin, 14 S. W. Rep. 462, 47 Ark. 49.

3. Bosbyshell *v.* Emanuel, 12 Smed. & M. (Miss.) 63.

And in a state where the courts will look to the record to discover who the affiant is, he need not show in his affidavit that he has an interest in the firm. Bosbyshell *v.* Emanuel, 12 Smed. & M. (Miss.) 63.

4. Renard *v.* Hargous, 13 N. Y. (3 Kern.) 259.

In an action by a partnership, where the statement of the Christian name of one of the partners in the writ of attachment is not the same as that given in the petition in the cause, it is a variance fatal to the writ, and the affidavit bearing the same defect can not be aided by reference to the petition; for the statements being contradictory, there is nothing to show which is correct. Focke *v.* Hardeman, 67 Tex. 173, 2 S. W. Rep. 363.

But the accidental omission in the petition of the name of one of the plaintiffs, where they are a firm, will not vitiate an attachment where the affidavit was made by one of the firm on behalf of the firm, and the bond was given by the firm as principals. Barriere *v.* McBean, 12 La. Ann. 493.

5. Gazan v. Royce, 78 Ga. 512, 3 S. E. Rep. 753.

6. Cassedy *v.* Mayer, 64 Miss. 356, 1 So. Rep. 510; Griffing *v.* Mills, 40 Miss. 611; Rowley *v.* Berrian, 12 Ill. 198.

And the courts will take notice who are authorized to administer oaths

before the same officer who issued the writ, or before an officer in the same county in which the writ is to run.[1] An affidavit made before a notary of another state, who certified that he is authorized to administer oaths, will authorize the issuance of an attachment.[2] But in Kansas and Michigan the affidavit can not be verified before a notary public who is the attorney of record of the plaintiff in the action.[3]

The affidavit may be made before the clerk of the court, or before his deputy clerk, who has general authority to perform the duties of his principal, even though it be not made to appear that the clerk was absent at the time.[4] Except in a suit which is brought by the clerk himself, when, if he makes affidavit before his deputy clerk, the writ will be quashed or the attachment dismissed on motion.[5] Although the statute may

within the county in which the suit is brought. Rowley *v.* Berrian, 12 Ill. 198.

An affidavit sworn to before the clerk of one county, in another county, is a nullity. Tanner & D. E Co. *v.* Hall, 22 Fla. 391.

But when an affidavit is made before a justice of another state, it must be made to appear that he was authorized to administer oaths. Fellows *v.* Miller, 8 Blackf. (Ind.) 231.

The objection that the attachment was granted upon an affidavit which was sworn to before a commissioner in another state, but which was submitted to the judge who granted the order without any certificate of the secretary of state, as required by New York law, is not necessarily fatal to the proceeding below. The omission may be amended and supplied. Lawton *v.* Kiel, 51 Barb. (N. Y.) 30.

As to the correction of informalities, clerical errors and omissions, see *post*, § 152.

The signature of a petitioner or witness, and the *jurat* of the magistrate annexed, are sufficient evidence that the oath was taken by the one and administered by the other. Loeb *v.* Smith, 78 Ga. 504, 3 S. E. Rep. 458.

1. Cassedy *v.* Mayers, 64 Miss. 356, 1 So. Rep. 510; Wright *v.* Smith, 66 Ala. 545; Wicker *v.* Schofield, 59 Ga. 210.

2. Mineral Point R. R. Co. *v.* Keep, 22 Ill. 9.

3. Tootle *v.* Smith, 34 Kan. 27; How. Stat. (Mich.) § 637; Swearington *v.* Howser, 37 Kan. 126, 14 Pac. Rep. 436; Yoakan *v.* Howser, 37 Kan. 130; 14 Pac. Rep. 438.

But such an affidavit is only voidable and may be amended. See cases above, and further as to "Amendments" see *post*, § 152.

4. Dorr *v.* Clark, 7 Mich. 310.

Where by the *jurat* it appears that the affidavit was sworn to before "H. L. W.," and the writ of attachment was tested and signed by "H. L. W., clerk," etc., it was presumed that the affidavit was sworn to before the clerk. Singleton *v.* Wofford, 4 Ill. (3 Scam.) 576.

5. Owens *v.* Johns, 59 Mo. 89.

not expressly authorize it to be done the affidavit may be made before the clerks in vacation.[1]

The affidavit in attachment may be made before a judge.[2] And it seems that an affidavit, made before a judge of the court from which the writ issues may be read in support of another like application, made to the same judge, on the same day, by other plaintiffs against the same defendant, to support the charge of absconding.[3] It may be made before the judge of any court of any state of the United States.[4] But an affidavit which was made before an associate justice of the district court of Allegheny county, Pennsylvania, and which recited that it was taken before "the subscriber, a judge of the district court of said county, being a court of record;" the clerk of the court certified that the judge, before whom the affidavit was made, was at the time associate law judge of said court, but did not certify that the court was a court of record; the authentication was held to be insufficient, and the attachment was therefore a nullity.[5]

There being nothing in the state statute to the contrary, the affidavit may be made before a commissioner of the state in which the suit is begun, who resides in another state.[6]

§ 131. Formal parts of the affidavit.—An affidavit for attachment, like any other legal document, must contain certain clauses tending to establish certain facts necessary to be shown; these are called the formal parts.

Where a form is prescribed by statute it should be followed, and an affidavit which does follow the statute is always sufficient; but where no form is specified a *substantial* compliance with all the requirements of the law is sufficient.[7]

1. James *v.* Jenkins, Hempst. (U. S. Cir. Ark.) 189.
2. Washington *v.* Hodgskin, 12 Gill & J. (Md.) 353.
3. Hallock *v.* Van Camp, 8 N. Y. S. 588, 55 Hun (N. Y.) 1.
4. Smith *v.* Greenleaf, 4 Har. & M. (Md.) 291.
5. Coward *v.* Dillinger, 56 Md. 59.
6. Grider *v.* Williams, 25 Ark. 1; Griffing *v.* Mills, 40 Miss. 611; Irving *v.* Edrington, 6 So. Rep. 177, 41 La. Ann. 671.
7. Shockley *v.* Bulloch, 18 Ga. 283; Harrill *v.* Humphries, 26 Ga. 514; McCollem *v.* White, 23 Ind. 43; Matthews *v.* Dare, 20 Md. 248. To the contrary, Loeb *v.* Smith, 78 Ga. 504, 3 S. E. Rep. 458.

The affidavit for attachment must be in writing.[1]

The formal parts of an affidavit in a suit are the *title*, the *venue*, the *signature*, the *jurat* and the *authentication;* if, however, it lack the title or caption, it is nevertheless an affidavit, provided it can be identified with the other pleadings in the cause, and is otherwise sufficient in form to satisfy the statute.[2] Good practice would require that the affidavit be entitled in the suit in which it is to be used, but, as the title is only for the purpose of identification with the cause, if it can be identified when it lacks the title, it will be good, and if it is entitled in a suit that is not pending it is a nullity.[3] It will be construed in connection with the writ issued at the same time; and, if it contains a reference to "the above entitled cause" when it is in fact not entitled, it may be cured by reference to the writ.[4] An affidavit showing that it was made in the cause and which is sworn to by a person stating that he is "agent and attorney for plaintiffs," and which was filed in the same court, on the same day, and with the same file number as the petition and attachment bond, sufficiently identifies it with the cause in which it was filed, whether written on the same paper as the petition or not.[5] An affidavit made by the plaintiff, alleging an indebtedness to him by the defendant, but which is not entitled of the court, nor of the parties, if it avers sufficient *ground* for attachment, will be in substantial compliance with the statute, and will sustain an attachment.[6] But an affidavit which omits to state the title of the cause, which does not state who affiant is, and nowhere names either the plaintiff or the defendant, is wholly insufficient.[7]

1. Gazan *v.* Royce, 78 Ga. 512, 3 S. E. Rep. 753; Pinson *v.* Kirsh 46 Tex. 26.

But in suits begun it need not always be a separate writing, see *ante* § 127, note. See as to magistrates, M'Kenzie *v.* Buchan, 1 Nott & M. (S. C.) 205–223.

2. Beebe *v.* Morrell, 76 Mich. 114, 42 N. W. Rep. 1119; Kinney v. Heald, 17 Ark. 397; West *v.* Woolfolk, 21 Fla. 189; Harris *v.* Lester, 80 Ill. 307.

3. Beebe *v.* Morrell, 76 Mich. 114, 42 N. W. Rep. 1119.

4. Grey *v.* Steedman, 63 Tex. 95; Munzesheimer *v.* Heinze, 74 Tex. 254, 11 S. W. Rep. 1094.

5. Munzenheimer *v.* Manhattan Cloak and Suit Co., 79 Tex. 318, 15 S. W. Rep. 389.

6. Cheadle *v.* Riddle, 6 Ark. 480.

7. Burgess *v.* Stitt, 12 How. (N. Y.) Pr. 401.

It is said, however, in Wisconsin, that there is no suit pending until the attachment issues, and that it is therefore irregular that an affidavit for procuring the attachment be entitled in the cause.[1]

The venue may, by permission of the court, be added by the proper officer, even after a motion has been made to quash the attachment on the ground of its omission.[2] The want of it will be fatal, however, unless it is supplied by amendment.[3] It has been held in suits begun by petition for attachment, when the petition was addressed to a proper court of the proper county, and the affidavit for the writ attached to the petition was signed by the affiant and certified by one giving his initials and the initials of his office only, thus, "H. B. M., J. P.," without stating the county, or state, where the oath was administered, that it will be presumed that the justice administered the oath within the proper county, and that the failure to set out more definitely the county and state where the oath was administered was an omission which could not materially prejudice the appellant.[4]

If the affiant's name is omitted from the body of the affidavit it will be no ground for dissolving the attachment, but in practice it is generally so recited.[5] The names of the individual members of a copartnership should be recited, but the affidavit will not be rendered void by a failure to make such recitation.[6] And the defendant's objection to the omission will not be heard after he has appeared and replevied the property.[7] Nor will the fact that two of the persons named as defendants in the caption of the affidavit were not connected with the transaction out of which the claim arose, be reason for disturbing the attachment.[8] But if, however, the petition and the affida-

1. Quarles *v.* Robinson, 1 Chand. (Wis.) 29.
2. Steuthers *v.* McDowell, 5 Neb. 491.
3. Rudolf *v.* McDonald, 6 Neb. 163.
4. Snell *v.* Eckerson, 8 Iowa 284.
5. Rudolf *v.* McDonald, 6 Neb. 163.
6. Johnston *v.* Smith, 10 S. E. Rep. 354, 83 Ga. 779.
7. De Leon *v.* Heller, 77 Ga. 740.
8. Cunningham *v.* Von Pustan, 9 N. Y. S. 255.

vit are at variance in giving the names of the members of the plaintiff firm, the variance will be fatal.[1]

The omission or misspelling of the defendant's name in the affidavit is considered a mere clerical defect, which may be amended, but when the names are *idem sonans* no amendment is necessary.[2]

The court will look to the whole record to supply technical omissions.[3] And where all the jurisdictional facts for an attachment proceeding are set forth, clerical errors are considered unimportant. As, for example, the omission of the word "are"[4] or "is," before "justly indebted," is considered unimportant.[5] In an affidavit for attachment averring that "defendant —— about fraudulently to convey and assign —— property * * * to hinder and delay —— creditors," the omitted words "is" and "his" may be inserted to fill out the blanks.[6] A verification "that —— statements in" the petition are true, omitting the word "the" before the word "statements," is sufficient.[7] An affidavit, made by one of two plaintiffs, setting forth that the affiant believes "he" ought to recover, etc., is not fatally defective in the use of the word "he" if it is sufficient in other respects.[8] In an affidavit, made by a partnership, stating that the defendants are justly indebted to the "said plaintiff," and that the plaintiffs are likely to lose their debt, the use of the word "plaintiff" in the blank intended for the creditor's name is a mere clerical error and not objectionable.[9] And the omission of the word "dollars" in stating the amount of the plaintiff's claim has been regarded as a clerical error and not sufficient to void the writ issued on such affida-

1. Focke *v.* Hardeman, 67 Tex. 173.

2. Cartwright *v.* Charbert, 3 Tex. 261; Ruth *v.* Green Bay & M. R. R. Co., 37 Wis. 344.

3. Miller *v.* Eastman, 27 Neb. 408, 43 N. W. Rep. 179; McClanahan *v.* Brack, 46 Miss. 246; State *v.* Foster, 10 Iowa 435.

4. Huffman *v.* Hardeman, (Tex.) 1 S. W. Rep. 575.

5. City Nat. Bank *v.* Flippen, 1 S. W. Rep. 897, 66 Tex. 610.

6. Stewart *v.* Cabanne, 16 Mo. App. 517.

7. Clark *v.* Miller, 88 Ky. 108, 10 S. W. Rep. 277.

8. Fairbank *v.* Lorig, 4 Ind. App. 451, 29 N. E. Rep. 452.

9. Weis *v.* Chipman, 3 Tex. Civ. App. 106, 22 S. W. Rep. 225.

vit.[1] But under the Texas statute requiring that parties suing out an attachment make oath that the attachment sought is not for the purpose of injuring or harassing "either" of the defendants named therein, an affidavit that "this attachment is not sued out for the purpose of injuring or harassing the defendant" where there are two defendants, is insufficient.[2]

An affidavit for an attachment against a corporation need not allege defendant's corporate character.[3] And in an affidavit for attachment against a private corporation of the state the title of the act incorporating it need not be stated; for if such statement be necessary in a pleading, the omission of it is not a jurisdictional defect but one which may be supplied by amendment either before or after judgment.[4]

An affidavit which is not signed by the affiant is a nullity. It is no affidavit and a court can get no jurisdiction thereunder.[5] Nor can the clerk allow the signature to be affixed to the affidavit after the issuance of the writ. Nor will the fact that the defendant appeared and pleaded to such affidavit subsequently filed cure the defect. The writ must be quashed.[6]

The rule relating to *idem sonans* is applicable in affidavits for attachment, for where the body of an affidavit showed that it was made by D. Herman, and it was signed D. Harmon, it was held to be sufficient under the attachment laws of Georgia.[7]

1. De Bebian *v.* Gola, 21 Atl. Rep. 275, 64 Md. 262.

2. Perrill *v.* Kaufman, 12 S. W. Rep. 125 72 Tex. 214; Gunst *v.* Pelham, 74 Tex. 586, 12 S. W. Rep. 233.

Under the Nevada statute requiring that an affidavit for an attachment to issue on Sunday state that it will be "too late to acquire a lien by said writ if he waits," etc., the substitution of the word "upon" for the word "by" in such clause has been held to be a clerical error and not sufficient to invalidate the attachment. Levy *v.* Elliott, 14 Nev. 435. See further as to "Amendments," *post*, § 152.

3. Mississippi, etc., R. R. Co. *v.* Plant, 58 Ga. 167.

4. Ruthe *v.* Green Bay & Minn. R. R. Co., 37 Wis. 344. See as to "Necessary Averments," *post*, § 132.

5. Hargadine *v.* Van Horn, 72 Mo. 370; Cohen *v.* Mance, 28 Ga. 27; Watt *v.* Carnes, 4 Heisk. (Tenn.) 532. Compare Simmons Hardw. Co. *v.* Alturas Com. Co., (Idaho) 39 Pac. Rep. 550.

6. Third Nat. Bank *v.* Garton, 40 Mo. App. 113; Carlisle *v.* Gunn, 68 Miss. 243, 8 So. Rep. 743.

But Tennessee has held to the contrary when the officer, before whom it was made, attested that it was sworn to (and subscribed) before him. West Tennessee Agr., etc., Assoc. *v.* Madison, 9 Lea (Tenn.) 407. See also Bates *v.* Robinson, 8 Iowa 318.

7. Kahn *v.* Herman, 3 Ga. 266.

The signing of an affidavit for attachment by two persons jointly is sufficient, although it purports to be made by only one of them.[1]

The affidavit must be sworn to, but it is not necessary that the affiant sign the oath, and he is as liable to the penalties of perjury if he does not sign as if he does.[2] The clerk administering the oath to the affiant should attest the fact that the affidavit was sworn to, but if he fails so to do it will not render the attachment inoperative. The certificate may be added by amendment.[3] And so may the omission to attach the *jurat* to the affidavit at the time of administering the oath be cured by amendment.[4] But the error of issuing an attachment on a certificate of the clerk, intended as an affidavit, which does not state that the plaintiff was sworn, and contains no *jurat*, can not be cured by a subsequent order in which it appears that the clerk, having been sworn, states that the plaintiff did, in fact, make oath to the matters stated in the certificate.[5]

While the officer should, of course, sign the *jurat* and add the description of his office,[6] yet if the affidavit has been actually sworn to, and that fact certified to, the omission to sign the *jurat* may be cured by amendment.[7] And where he signs his name and adds the word "clerk" the affidavit will be good even without more fully designating his office or the ad-

1. Fortenheim *v.* Claflin, 14 S. W. Rep. 462, 47 Ark. 49. See Norman *v.* Horn, 36 Mo. App. 419.

2. Bates *v.* Robinson, 8 Iowa 318.

As to the "suitor's test oath" see Kyle *v.* Jenkins, 6 W. Va. 371; Ross *v.* Jenkins, 7 W. Va. 284; Lynch *v.* Hoffman, 7 W. Va. 553; Lynch *v.* Hoffman, 7 W. Va. 578.

3. Wiley *v.* Bennett, 9 Baxter (Tenn.) 581; May *v.* Farrill, 22 Tex. 340.

4. Fortenheim *v.* Claflin, 14 S. W. Rep. 462, 47 Ark. 49.

But not if it also lack the statement of the amount due. Cosner's Adm'r *v.* Smith, 15 S. E. Rep. 977, 36 W. Va. 788.

5. Cosner's Adm'r *v.* Smith, 15 S. E. Rep. 977, 36 W. Va. 788.

6. Birdsong *v.* McLaren, 8 Ga. 521.

7. Cook *v.* Jenkins, 30 Iowa 452; Stout *v.* Folger, 34 Iowa 71; Kruse *v.* Wilson, 79 Ill. 233; Hyde *v.* Adams, 80 Ala. 111; McCartney *v.* Branch Bank, 3 Ala. 709; Farrow *v.* Hayes, 51 Md. 498; Hart *v.* Jones (Pa. Com. Pl.), 6 Kulp. 326; Farmer's Bank *v.* Gettinger, 4 West Va. 305; English *v.* Wall, 12 Rob. (La.) 132; Tacoma Grocery Co. *v.* Draham, 36 Pac. Rep. 31, 8 Wash. 263; Wiley *v.* Bennett, 9 Baxter (Tenn.) 581.

dition of the seal of the court.[1] And if he sign the affidavit with his name only, and sign the writ issued on the same day by the same name, and add the description of his office, the omission in the affidavit will be cured by reference to the writ.[2] And where an affidavit for a writ of attachment purports, on its face, to have been made in a named county, and the *jurat* is signed by one as a notary public, it will be intended that the one who signed was a notary for that county if the suit is in fact brought in such county.[3]

The omission of the *jurat* is the omission of a formal part, and may be corrected by amendment.[4]

The use of the seal of domestic officers is not a necessary prerequisite. Where an affidavit for a writ of attachment is made in the county in which the suit is brought and before a notary public it need not be authenticated by his notarial seal.[5] Nor is it necessary that the signature of the clerk of the court to a *jurat* for an attachment be verified by his official seal.[6] If necessary it may be added by amendment.[7]

Although one or more informalities may be cured by amendment, yet if a written instrument purport to be an affidavit for attachment and be neither signed by the affiant nor contain a *jurat* signed by the clerk under the seal of the court, or by some other officer legally authorized to administer oaths, it will be fatally defective; and no attachment can be founded thereon.[8]

Defects in an affidavit that are merely informal, and do not go to the jurisdiction, are waived by an appearance to the action.[9]

§ 132. Necessary averments—Generally.—To every valid

1. Simon *v.* Stetter, 25 Kan. 155.
2. Singleton *v.* Wofford, 4 Ill. (3 Scam.) 576.
3. Dyer *v.* Flint, 21 Ill. 80.
4. Skinner *v.* Beshoar, 2 Col. T. 383.
5. Dyer *v.* Flint, *supra*.
6. Finn *v.* Rose, 12 Iowa 565.
7. Whittenberg *v.* Loyd, 49 Tex. 633.
8. Third Nat. Bank *v.* Garton, 40 Mo. App. 113; Carlisle *v.* Gunn, 68 Miss. 243. 8 So. Rep. 743.
9. Brayton *v.* Freese, 1 Ind. 121; see as to "Amendment of Affidavit" *post*, §152, and as to "Appearance of Defendant" *post*, § 216 *et seq.*

affidavit for an attachment, there must be two distinct and essential averments: (1) There must be an averment of a cause of action between certain named parties, based upon a money demand;[1] and (2) there must be a further averment of a ground for attachment; that is, a statement of facts, because of the existence which the statute will permit an attachment to issue. These averments will receive particular mention presently. There are sometimes other and minor allegations required,[2] but these two conditions are always essential and

1. It has been held in Michigan that the real plaintiff was sufficiently denoted by the affidavit of one showing himself to be the agent of a named company and that it was the concern with which the defendants had the dealings on which the suit was based, although the names of the parties comprising such company were not stated. Emerson *v.* Detroit Steel and Spring Co., 100 Mich. 127, 58 N. W. Rep. 659; Emerson *v.* Spearman, 100 Mich. 127, 58 N. W. Rep. 659.

And in Wisconsin an affidavit alleging the indebtedness of the defendants to the plaintiff and further stating that the deponent believed "that the parties aforesaid" had assigned or were about to assign their property to defraud creditors, the court held that the words "the parties aforesaid" necessarily referred to the defendants and that there was no such indefiniteness and uncertainty as to render the affidavit defective in that regard. Spitz *v.* Mohr, 86 Wis. 387, 57 N. W. Rep. 41.

2. It is required in Texas that the affidavit state that the attachment is not sought for the purpose of "injuring or harassing" the defendant. If it does not so state, the attachment will be dismissed on motion or at the instance of the sureties on the bond. Moody *v.* Levy, 58 Tex. 532; Burch *v.* Watts, 37 Tex. 135.

In Tennessee the affidavit in an attachment ancillary to an action *ex delicto* must state the cause of action, the nature thereof, the tribunal in which it is depending, the amount of damages laid, and that the cause of action stated is just. Thompson *v.* Carper, 11 Humph. (Tenn.) 542.

But in New York and Minnesota an affidavit for attachment in suits already begun need not state that the action has been commenced. Stoiber *v.* Thudium, 44 Hun (N. Y.) 70; Blake *v.* Sherman, 12 Minn. 420.

In Michigan, before an attachment can issue in an action for tort against a non-resident, the affidavit must fully describe the cause of action. As to what is not a sufficient averment of negligence under such statute see McCrea *v.* Muskegon Circuit Judge, 100 Mich. 375, 58 N. W. Rep. 1118.

In West Virginia, under a statute requiring that a defendant corporation shall appoint a person to accept service of process within one hundred days of its organization, the affidavit in attachment must show that the one hundred days have elapsed since the organization of the corporation or it can not be proceeded against for having failed to comply with such requirement. United States Baking Co. *v.* Bachman, 38 W. Va. 84, 18 S. E. Rep. 382.

And in West Virginia it will not be

their averment in all cases absolutely necessary.[1] An affidavit is sufficient if it alleges all the material issuable facts necessary to entitle the plaintiff to recover in the action. It need not allege such matters as are merely issuable, or available to the defendant by pleading it in abatement.[2] It is not generally necessary that there should be an averment of the citizenship of the plaintiff in the affidavit.[3] Under a statute allowing an action on a contract against a foreign corporation only where the plaintiff is a resident, or where the contract was made within the state, or where the cause of action arose within the state, the court has no jurisdiction to grant an attachment unless the affidavit shows that the court has jurisdiction of the subject-matter. That is to say, to secure under such a statute an attachment against a foreign corporation, it is a prerequisite that the affidavit should show that the plaintiff is a resident;

fatal if the affidavit fails to aver technically that affiant is entitled to recover "in the suit" the amount specified, if the same appears from the filing of the affidavit, which avers that affiant is entitled to recover a certain sum by virtue of a note, describing it, that the sum is due and unpaid, and that affiant has instituted a suit to recover it, and is about to issue an attachment in such suit; it also further appearing that the attachment was issued in the writ, and the debt being one that could properly be recovered therein. Altmeyer *v.* Caulfield, 17 S. E. Rep. 409, 37 W. Va. 847.

But in North Carolina it is not necessary in an attachment against a non-resident that the affidavit state that the defendant "had property in the state." Parks *v.* Adams, 18 S. E. R. 665, 113 N. C. 473.

When it is necessary that the affidavit shall be made by the plaintiff himself, it must state that the affiant is a creditor of the defendant. Frisby *v.* Williamson, 16 N. J. L. (1 Harr.) 61.

1. Skiff *v.* Stewart, 39 How. (N. Y.) Pr. 385; Gould *v.* Bryan, 3 Bosw. (N. Y.) 626; Hass *v.* Brower, 76 N. C. 428; Willets *v.* Ridgway, 9 Ind. 367; Hisler *v.* Carr, 34 Cal. 641.

2. Primrose *v.* Roden, 14 Tex. 1; Barbee *v.* Holder, 24 Tex. 225.

As to cases in which an attachment is preceded by a petition, and the petition contains all that is required to be sworn to, see Watts *v.* Harding, 5 Tex. 386; Burnam *v.* Romans, 2 Busch. (Ky.) 191, and code states generally, see *ante* p. 189, note.

3. Lindner *v.* Aaron, 6 Miss. (5 How.) 581; Amos *v.* Allnutt, 10 Miss. (2 Sm. & M.) 215; Peters *v.* Bower, Minor (Ala.) 69.

If the objection is tenable it must be taken advantage of by a plea. Peters *v.* Bower, Minor (Ala.) 69; *contra*, Staples *v.* Fairchild, 3 N. Y. (3 Comst.) 41; Baldwin *v.* Neale, 10 Gill & J. (Md.) 274. As to presumption that a partnership is within the state, see Renard *v.* Hargous, 2 Duer (N. Y.) 540.

or that the contract was made in the state; or that the cause of action arose therein; and an amendment of the affidavit after the issuance of the writ will not suffice because matters going to the jurisdiction are prerequisite in all cases.[1]

The ownership of the debt is a material part of the description.[2] An affidavit that the debt is "on account of the steamboat and owners," sufficiently shows that the debt is due in their capacity as owners, and not in their private and individual capacity.[3] And an affidavit for attachment, by speaking of the applicant as owning the demand "under assignment to F. H.," to whom the original creditor had assigned it, sufficiently describes his title.[4]

In Georgia, an affidavit to sue out an attachment for purchase-money must so describe the property for which the debt was created and in possession of the debtor as to certify to the officer making the levy what property he is authorized to seize and sell.[5]

It has been said that the same precision is not required by

1. Adler *v.* Order of American Fraternal Circle of Baltimore City, (Sup.) 19 N. Y. S. 885, 28 Abb. (N. Y.) N. C. 233; Oliver *v.* Walter Haywood Chair Manufg. Co., 10 N. Y. S. 771, 57 Hun (N. Y.) 588.

2. So where the return in an attachment showed that a specific debt attached owing from M to the old firm of D & D, it was held that it could not be applied to the new firm of D & D, a distinct partnership, although a surviving member of the old firm was a member of the new. Debts due a partnership are due to it only and not to an individual member thereof. Allis *v.* Day, 13 Minn. 199.

3. Auter *v.* Steamboat, etc., 34 Miss. 269.

4. Hall *v.* Stryker, 27 N. Y. 596.

5. Waxelbaum *v.* Paschal, 64 Ga. 275.

It must contain a description of the property for which the debt is created, and such description must be sworn to positively, and not simply to the best of the plaintiff's knowledge and belief. Affidavit "that to the best of deponent's knowledge and belief, the following is a correct list and description of the property for which said debt was created, to wit: four fancy decanters, one vase," with a great number of other articles set forth in like manner, is not positive, and for that reason the attachment issued thereon was void, and was properly dismissed on motion. Bruce *v.* Conyers, 54 Ga. 678.

An affidavit upon which an attachment for purchase-money is based, which states that the defendant is indebted to the plaintiff in the sum of $767.65, and that said indebtedness was created in part by the purchase of a one-half interest in certain property specified, is insufficient. It should designate the amount due therefor. Camp *v.* Cahn, 53 Ga. 558.

the courts in affidavits for the cause of action in attachment as in cases of *capias*.[1] But nevertheless an affidavit for a writ of attachment must allege positively and unequivocally the requirements of the statute,[2] though it need not run in the exact language of the statute, provided the requisite facts are clearly shown.[3] Nor need it state the probative facts out of which an indebtedness arose, but only the ultimate facts required by the statutes.[4] In New York formerly, under the revised statutes, an affidavit which would have been sufficient under the non-imprisonment act was sufficient for an attachment.[5] And under the code, the sufficiency of the affidavits on which an attachment issued is no longer a jurisdictional question, but a mere question of regularity in issuing the process, of which none but a party to the action can take advantage.[6]

It is the proper averments in the affidavit which sustain the issuance of the writ, and, in Texas, it also determines the validity of the writ; for there can be in that state no traverse of the facts averred; the bond protects the defendant against the effect of falsehood.[7] But in other states the rule is that although an affidavit contain the necessary averment of a cause of action, together with an averment of one of the specified grounds for an attachment, will procure the issuance of the writ, it is not conclusive of the plaintiff's right to begin an action by an attachment;[8] for, while it is a sufficient prerequisite to the issuing of the attachment, such attachment must be justified, not by the belief of the existence of a fact but by the fact of its existence.[9] And the defendant may move to

1. Redwood *v.* Conseque, 2 Browne, (Pa.) 78.

2. Dyer *v.* Flint, 21 Ill. 80; Adams v. Merritt, 10 Ill. App. 275; Richter *v.* Wise, 6 Thomp. & C. (N. Y.) 70; 3 Hun (N. Y.) 398; Bennett *v.* Edwards, 27 Hun (N. Y.) 352; Edick *v.* Green, 38 Hun (N. Y.) 202; Wilmerding *v.* Cunningham, 65 How. (N. Y.) Pr. 344.

3. Crew *v.* McClung, 4 Green (Ia.) 153.

4. Crawford *v.* Roberts, 8 Ore. 324.

5. Colver *v.* Van Valen, 6 How. (N. Y.) Pr. 102.

6. Matter of Griswold, 13 Barb. (N. Y.) Pr. 412.

7. Dwyer *v.* Testard, 65 Tex. 432.

8. Kelley *v.* Force, 16 R. I. 628 18 Atl. Rep. 1037.

9. Sublett *v.* Wood, 76 Va. 318.

have an attachment dismissed, and sustain his motion by proof of the non-existence of the grounds alleged in the affidavit.[1]

Generally an affidavit for an attachment *against* joint debtors must show a cause therefor existing as to all, or an attachment will not be permitted against the property of all.[2] And an affidavit for the attachment of the individual property of a copartner will be governed by the principles hereinbefore stated.[3] An attachment in *behalf* of a partnership made by one member of the firm will not be insufficient because the affidavit itself does not state affiant's interest, if the other parts of the record show that he was in fact one of the partners.[4] But the rule may be otherwise in a state where omissions may not be corrected by reference to other parts of the record.[5]

It is not absolutely essential that all the averments necessary to be sworn to before the issuance of an attachment, should be made in one affidavit nor by one individual, provided that necessary facts are all stated in the affidavits when taken together.[6]

The sufficiency of the affidavit can not be determined until the defendant appears and pleads,[7] or moves to have the at-

1. See *post*, § 326, "Dissolution of Attachment."

In Indiana the affidavit must show that the property sought to be reached is subject to execution. Blair *v.* Smith, 114 Ind. 114, 15 N. E. Rep. 817. But in Nebraska and North Carolina it is not necessary that it should state that the defendant has property within the jurisdiction of the court. Grebe *v.* Jones, 15 Neb. 312; Parks *v.* Adams, 18 S. E. Rep. 665, 113 N. C. 473. In Virginia the affidavit is sufficient if it states that he has property in any county in the state. Anderson *v.* Johnson, 32 Gratt. (Va.) 558. And as to the affidavit for the attachment of law in Arkansas see Webster *v.* Daniel, 14 S. W. Rep. 550, 47 Ark. 131.

2. Courrier *v.* Cleghorn, 3 Green (Iowa) 532; Hamilton *v.* Knight, (Ind.) 1 Blackf. 25.

And under a statutory requirement that the affidavit should state that the action was not brought to vex or harrass the debtor, an attachment against joint debtors will not be supported by an affidavit that it is not made to vex or harrass the "defendant." Gunst *v.* Pelham, 74 Tex. 586.

3. See *ante*, § 47, "Attachment of Partnership Property."

4. Bosbyshell *v.* Emanuel, 20 Miss. (12 Sm. & M.) 63.

5. Willis *v.* Lyman, 22 Tex. 268; and *supra*, § 129.

6. Edick *v.* Green, 38 Hun (N. Y.) 202; Lewis *v.* Stewart, 62 Tex. 352. See *ante*, §129, "By whom to be made."

7. Hynson *v.* Taylor, 3 Ark. 552.

tachment dismissed.[1] And it has been said in Mississippi that if the facts alleged in the affidavit are false, the remedy is upon the bond, because the truth of the affidavit can not be traversed,[2] but the contrary is held in New Jersey.[3] If an attachment lack a jurisdictional averment it can not be remedied by amendment.[4]

§ 133. **Averment of indebtedness—(a) Effect on the judgment.**—To make a valid attachment there must be a strict compliance with all the statutory requirements and incidents pertaining to this mode of redress which is so little favored by the courts because of its stringency.[5] There must be a statement on oath of a *cause of action* other than the statements of *grounds for the bringing of an attachment* thereon, and this cause of action must be a money demand, as hereinbefore shown.[6] In other words, the affidavit for attachment must contain an averment of indebtedness,[7] and, as near as practicable, the amount thereof.[8] Such an indebtedness must be a substantial one; for an attachment can not issue where only nominal damages appear, from the affidavit, to be recoverable.[9] Many states prescribe a minimum amount for which attachment may be brought in certain courts. And when the affidavit states an indebtedness greater than the amount sufficient to authorize the attachment, it will be sufficient, without the allegation that the defendant is indebted in a greater sum than that named by the statute.[10] Where the defendant is not before the court, the

1. See *post*, § 326.

2. Smith *v.* Herring, 18 Miss. (10 Smed. & M.) 518.

3. City Bank *v.* Merrit, 13 N. J. L. (Green) 131; Branson *v.* Shinn, 13 N. J. L. (Green) 250.

4. Sanders *v.* Cavett, 38 Ala. 51; Adler *v.* Order of A. F. of B. C., 19 N. Y. S. 885; 28 Abb. (N. Y.) N. C. 233; Oliver *v.* Walter Heywood Chair Mfg. Co., 10 N. Y. S. 771, 57 Hun (N. Y.) 558.

5. Wooster *v.* McGee, 1 Tex. 17.

6. See "On What Demand" *ante*, § 12.

7. Hynson *v.* Taylor, 3 Ark. 552; Cosner's Adm'r *v.* Smith, 36 W. Va. 788, 15 S. E. Rep. 977.

8. Blakely *v.* Bird, 12 Iowa 601.

In Maryland an affidavit of indebtedness which omitted the word "dollars" was held sufficient when the writ authorized an attachment for so many dollars. DeBebian *v.* Gola, 64 Md. 262.

9. Walts *v.* Nichols, 32 Hun (N. Y.) 276; Haebler *v.* Bernharth, 4 N. Y. S. 873, 56 N. Y. Super. Ct. 575.

10. Hughes *v.* Martin, 1 Ark. 386.

plaintiff will not be entitled to have judgment for a greater sum than that claimed in the affidavit, together with costs and interests.[1] But ordinarily the amount to be recovered by the plaintiff is not limited to the amount sworn to be due in the affidavit.[2] And when the verdict is demonstrably correct according to the plaintiff's theory, and no objection is made in the trial court, it is no ground for reversal that the amount of the verdict exceeds that claimed by the affidavit for attachment.[3] Furthermore, where a certain sum, besides interest, damages, etc., is averred by the creditor to be due to him, and he gives the bond required by the statute, the attachment will not be dismissed because the amount of damage and interest stated in the pleading subsequently filed swells the debt to a greater sum than that named in the affidavit. The bond refers to the affidavit, and if they be sufficient for the amount therein stated the attachment will be valid.[4] There is no objection that the damages laid in the declaration are beyond the amount sworn in the affidavit.[5] But it is necessary that the affidavit, writ of attachment, or declaration (if there be one), shall contain a description of the demand with so much certainty that a recovery therein will be a bar to any other suit for the same demand.[6]

It seems that when a party acts in good faith and sues out

1. Rowley *v.* Berrian, 12 Ill. 198.

An affidavit for an attachment stated the amount of the indebtedness to be a certain sum with interest from a certain day. The writ and published notice named only that sum, omitting any allusion to interest. It was held that a default judgment in favor of plaintiff for the debt and interest, as stated in the affidavit, could not be reduced by *remittitur* to the amount stated in the writ and notice, as the record must show that the merits are with plaintiff as to the residue, after the *remittitur*, which can not appear on a default, after publication only. Cohen *v.* Smith, 33 Ill. App. 344.

2. Pew *v.* Yoare, 12 Mich. 16.

3. Calhoun *v.* Stout, 26 Ill. App. 413.

4. Fellows *v.* Dickens, 5 La. Ann. 131.

5. Moore *v.* Harlan, 37 Ga. 623.

In Utah the affidavit is not required to contain the allegations of the complaint. It is enough if it contain general terms describing the demand and shows it to be that on which suit is brought. Bowers *v.* London Bank, 3 Utah 417.

6. Bond *v.* Patterson, 1 Blackf. (Ind.) 34.

an attachment for a greater sum than is actually due, he will not be guilty of constructive fraud when he commences an attachment upon a stated account; and that his attachment will be valid against subsequent attaching creditors to the extent of the amount actually due to him.[1]

Where the affidavit is insufficient because it does not show the existence of the indebtedness for which the attachment is asked, it may be vacated upon the application of one who afterwards acquires an interest in the property seized.[2]

§ 134. (b) **When variance fatal.**—In a few states great accuracy is required in the averment of indebtedness in the affidavit, and a variance between the cause of action alleged in the affidavit and that stated in the petition, complaint or declaration is such defect as may be taken advantage of by plea in abatement.[3] In Texas, where an affidavit and writ of attachment stated the amount of the debt to be $508.82, while the petition in the suit stated it to be $488.44, the variance was said to be fatal and the attachment was quashed.[4] And where the affidavit averred the instrument sued on to be a note "with interest from December 2," and the petition described it as a note dated December 2, due sixty days after date, "with interest from maturity," the variance was, on motion to quash the writ, held to be fatal.[5] But when the debt and rate of interest is correctly stated, a slight mistake in the calculation of interest is not fatal.[6] But in Indiana, an affidavit stating the indebtedness to be $102.92 was held to be immaterially variant when the proof showed $116.34.[7] And in Wisconsin, the averment in the affidavit of a little more or less than is actually due will not vitiate the attachment.[8]

1. Mendes *v.* Freiters, 16 Nev. 388; Emerson *v.* Detroit Steel and Spring Co., 100 Mich. 127, 58 N. W. Rep. 659; Emerson *v.* Spearman, 100 Mich. 127, 58 N. W. Rep. 659.

2. Smith *v.* Davis, 29 Hun (N. Y.) 306. See further "Dissolution of Attachment," *post*, § 326.

3. Wright *v.* Snedecor, 46 Ala. 92; Evans *v.* Tucker, 59 Tex. 249.

4. Moore *v.* Corley, (Tex.) 16 S. W. Rep. 787.

5. Moore *v.* First Nat. Bank, 82 Tex. 537, 18 S. W. Rep. 657.

6. Rainwater Boogher Hat Co. *v.* O'Neal, 18 S.W. Rep. 570, 82 Tex. 337; La Force *v.* Schiff-Lewin Co., (Tex. Civ. App.) 29 S. W. Rep. 77.

7. Paul *v.* Ward, 21 Ind. 211.

8. Lathrop *v.* Snyder, 16 Wis. 293.

In Colorado, under a statute prescribing that in a writ of attachment the amount "shall be stated in conformity with the affidavit," the affidavit averred actual damages $500 and the writ issued for treble damages—treble damages being allowed by statute in cases of the nature of the one brought—there was said to be no inconformity; and the action was sustained on motion to dismiss.[1] In Arkansas, an affidavit stated the claim to be for a certain sum with interest and current exchange at New York. The writ commanded the sheriff to attach, etc., to satisfy a debt of the same sum, with interests and costs, but it was silent as to exchange. The bond made no mention of interest, though interest was mentioned in the affidavit. It was held, that the omission as to exchange was not a variance, because it was not in that part of the writ which summoned the defendant to answer the complaint; also that there was no variance between the attachment bond and the affidavit.[2] And in Texas, when the writ issues for no greater sum than that in the affidavit sworn to as the indebtedness, the attachment is valid, although the petition or the itemized account filed by the plaintiff shows a larger indebtedness.[3]

In Missouri, a variance between the statement of a cause of action in the petition and that averred in the affidavit will not be fatal. The former controls the latter.[4]

§ 135. (c) **Must be in positive terms—not on information and belief.**—The plaintiff can not proceed by attachment unless he can swear with certainty to the amount due him. The facts constituting the indebtedness must be alleged positively and not inferentially.[5] The plaintiff must swear positively that

1. De Stafford *v.* Gartley, 24 Pac. Rep. 580, 15 Colo. 32.

2. Whitlock *v.* Kirkwood, 16 Ark. 488.

3. Evans *v.* Lawson, 64 Tex. 199; Brasher *v.* Cuchia, 24 S. W. Rep. 85, 4 Tex. Civ. App. 690.

4. C. Aultman & Co. *v.* Daggs, 50 Mo. App. 280.

In this case the former showed the cause of action to be for the breach of a contract of sale under which the plaintiff was entitled to immediate compensation and the affidavit averred that the debt was not yet due.

5. Quarles *v.* Robinson, 1 Chand. (Wis.) 29, 2 Pinney (Wis.) 97; Talbot *v.* Woodle, 19 Wis. 174; Robinson *v.* Burton, 5 Kan. 293; Black *v.* Scanlon, 48 Ga. 12; Joseph *v.* Stein, 52 Ga. 332; Neal *v.* Gordon, 60 Ga. 112; Krutina

the defendant is liable for a particular sum, and in such a form as to exclude the idea that the debt may have been extinguished by payment, compensation or otherwise.[1] There must be no uncertainty left on the face of the affidavit making it necessary that the indebtedness be gathered from recitals or by inference.[2] Its terms must be so positive as to leave no room for speculation.[3]

It is said in Georgia that where the affidavit obviously means that the defendant is indebted to the plaintiff, a clerical error in the omission of the word "is" before "indebted" will not vitiate the attachment.[4] But the supreme court of Texas holds the plaintiff to great precision in these matters, and says that no presumption will be entertained as to what the plaintiff intended to swear, and that the court will be governed by what he has sworn to and will not supply a defect, which, if not supplied, will prevent the affidavit from coming up to the requirements of the statute, and that the

v. Culpepper, 75 Ga. 602; Wilson *v.* Arnold, 5 Mich. 98; Dorr *v.* Clark, 7 Mich. 310; Jones *v.* Leake, 19 Miss. (11 Smed. & M.) 591; Greene *v.* Tripp, 11 R. I. 424. See Brinegar *v.* Griffin, 2 La. Ann. 154; Johnson *v.* Short, 2 La. Ann. 277; Barrow *v.* M'Donald, 12 La. Ann. 110; Hyde *v.* Higgins, 15 La. Ann. 1; Morgan *v.* Turner, 23 S. W. Rep. 284, 4 Tex. Cir. App. 192; Turner *v.* Morgan, 23 S. W. Rep. 284, 4 Tex. Civ. App. 192.

1. Elam *v.* Barr, 11 La. Ann. 622.

2. Manton *v.* Poole, 67 Barb. (N. Y.) 330; Golden Gate Concentrator Co. *v.* Jackson, 13 Abb. (N. Y.) N. C. 476; Thomas *v.* Dickinson, 11 N. Y. S. 436, 58 Hun (N. Y.) 603.

3. Lathrop *v.* Snyder, 16 Wis. 293.

But if positively stated, a little more or less than is actually due it will not thereby be vitiated in Wisconsin. Lathrop *v.* Snyder, 16 Wis. 293.

And an affidavit stating that the defendant is indebted to the plaintiff "in the several sums of money mentioned" in the petition is a sufficient averment of the sum due. Morgan *v.* Johnson, 15 Tex. 568. But see Hochstadder *v.* Sam, 11 S. W. Rep. 408, 73 Tex. 315.

In South Carolina an affidavit, on filing a declaration in attachment, that the defendant was indebted to the plaintiff on a note, for a stated amount; that no part of the same was paid, and that the plaintiff was indebted to the defendant "some small amount, but he did not know how much, contracted since the note was given," is sufficient. Turner *v.* M'Daniel, 1 McCord (S. C.) 552.

Under the Maryland code when an attachment is issued for indebtedness on money loaned at various times, it is necessary that the account annexed to the affidavit of the attaching creditor should specify the dates and amounts of the several loans. Cox *v.* Waters, 34 Md. 460.

4. Buchanan *v.* Sterling, 63 Ga. 227.

omission of the word "is" before "justly indebted" leaves the affidavit without meaning, and an attachment thereon void.[1] But an affidavit stating that the debt is due "by express contract and by implied contract" is said to be not indefinite.[2]

In general an affidavit of indebtedness made on information and belief will not support an attachment.[3] But in states where the officer issuing the attachment acts in a judicial capacity,[4] a statement of indebtedness on information and belief, accompanied by the statement of facts showing the source of such information and the ground for such belief, may justify the issuance of an attachment.[5] And where the material allegations so stated is in affidavits on file in the court, which are referred to, but are not quoted from, and no part of their contents set out, so that the court may know what facts are stated therein, it is sufficient.[6] The statutes of some

1. City Nat. Bank *v.* Flippen, 66 Tex. 610; Perrill *v.* Kaufman, 72 Tex. 214.

2. Emerson *v.* Detroit Steel and Spring Co., 100 Mich. 127, 58 N. W. Rep. 659; Emerson *v.* Spearman, 100 Mich. 127, 58 N. W. Rep. 659.

3. Ross *v.* Steen, 20 Fla. 443; Green *v.* Tripp, 11 R. I. 424.

An affidavit which states that the claim of plaintiff is about a stated sum, "according to his best information and belief," is not a sufficient compliance with a section of the South Carolina code which provides that the affidavit shall specify "the amount of the claim, and the grounds thereof." Ketchin *v.* Landecker, 32 S. C. 155, 10 S. E. Rep. 936.

Where a plaintiff resident in a foreign country, an affidavit, made by his resident agent, that he, the agent, "is informed and believes" that the defendant is indebted to the plaintiff, etc., is sufficient, even though the general rule is that such affidavit must be distinct and positive in stating the existence of the debt, or other cause of action. Kerr *v.* Phillips, 2 Rich. (S. C.) 197. As to the affidavit of an agent on information and belief, see also Bergh *v.* Jayne, 7 Martin N. S. (La.) 609; Bridges *v.* Williams, 1 Martin N. S. (La.) 98.

In North Carolina the plaintiff need not swear positively to the amount of his debt or damage; it is sufficient if he swear to the best of his knowledge and belief. Powell *v.* Hampton, Court of Con. (N. C.) 86.

4. See *post*, § 144.

5. Simon *v.* Johnson, (Pa. Com. Pl.) 7 Kulp, 166; Garner *v.* White, 23 Ohio St. 192; Hamilton *v.* Steck, 10 N. Y. S. 177; Patterson *v.* Delaney, 14 N. Y. S. 100, 59 Hun (N. Y.) 626; Empire Warehouse Co. *v.* Mallett, 84 Hun (N. Y.) 561.

6. Selser Brothers Co. *v.* Potter Produce Co., (Sup.) 28 N. Y. S. 428, 77 Hun (N. Y.) 313.

Further as to what is not sufficient, see Cattaraugus Cutlery Co. *v.* Case, 9 N. Y. S. 862; American Horse Exchange *v.* Strauss, (Sup.) 27 N. Y. S. 282.

states especially provide for the making of affidavits, by others than the plaintiff, upon information and belief. But under a statute permitting an affidavit to be so made, an averment that the affiant "thinks" the plaintiff ought to recover the sum claimed, is not equivalent to the averment that he "believes" he ought to recover such sum.[1] Nor is an affidavit by a clerk of the plaintiff, that he "knows or has good reason to believe," a sufficient conformity to a statute which requires a statement that the plaintiff "knows or believes."[2] But an affidavit made by the attorney of the plaintiff on information received from the parties averring that affiant believes the allegations in the petition to be true, is equivalent to swearing to a knowledge and belief of the affiant, and is therefore sufficient.[3]

Information transmitted in a communication by telephone will be sufficient in a state permitting the affidavit to be made on information and belief,[4] provided it is made to appear that the speaker was identified with reasonable certainty by the affiant.[5]

§ 136. (d) **Of "justly indebted."**—By many statutes the affiant is required to state that the defendant is "justly indebted" to the plaintiff, or that the plaintiff has a just demand. But while Texas holds strictly to the rule that the omission of the word "justly" is a fatal defect,[6] yet in most states less strictness is generally required in this regard than in many others. And if the affiant allege that the defendant is indebted, or when from the facts alleged it necessarily follows that he is justly indebted, it is sufficient, though it omits the word "justly,"[7] and if it fails to state that the plaintiff has a just demand it will not be a nullity.[8] An affidavit that "the plaintiffs are justly entitled to recover" the sum claimed is

1. Rittenhouse *v.* Harman, 7 W. Va. 380.

2. Dean *v.* Oppenheimer, 25 Md. 368.

3. Dinkelspiel *v.* New Albany Woolen Mills, 46 La. 576, 15 So. Rep. 282.

4. Murphy *v.* Jack, 27 N. Y. S. 802, 76 Hun (N. Y.) 356.

5. Murphy *v.* Jack, 36 N. E. Rep. 882, 142 N. Y. 215.

6. Evans *v.* Tucker, 59 Tex. 249; Marshall *v.* Alley, 25 Tex. 342.

7. Livengood *v.* Shaw, 10 Mo. 273; Simon *v.* Johnson, (Pa. Com. Pl.) 7 Kulp. 166.

8. Burnett *v.* McCluey, 92 Mo. 230.

sufficient, in West Virginia, under a statute which requires that the affiant shall state that the plaintiff's claim is just.[1] In Kentucky there must be an allegation that the plaintiff's claim is just, and the omission is ground for reversal; but an amendment is allowable.[2] And in Tennessee, where facts have been stated that show the justice of the plaintiff's claim, though failing to allege "a just claim," as required by the statute, the proceedings can not be attacked collaterally.[3] In Alabama, an affidavit for an attachment stating that the defendants "are or will be justly indebted" may be amended by striking out the words "or will be."[4] And in Kansas, an affidavit which shows that the claim is just, it is sufficient, although no positive statement of the justice of the claim is made.[5]

Under a statute providing for an attachment against one of two debtors, an affidavit averring that such one and another, "the defendants named in the annexed writ of attachment, are justly indebted to him, the plaintiff," is sufficient to support a judgment therein against such one.[6] And an affidavit setting up that the one and another is justly indebted to the plaintiffs in the sum named, and that the same is now due from said one on express contract, is held to be sufficient; because the first allegation imports a joint debt which if due from the one must also be due from the other, and the omission to so specify will not render the affidavit bad.[7]

1. Gutman *v.* Virginia Iron Co., 5 W. Va. 22.

But if it does not state the sum "at the least," which the affiant believes plaintiff is "justly" entitled to recover, it will be defective. Crim *v.* Harmon, 18 S. E. 753, 38 W. Va. 596.

And if it fail to state the amount and does not state that plaintiff was sworn, etc., it will be bad. Cosner's Admr. *v.* Smith, 15 S. E. Rep. 977, 36 W. Va. 788.

2. Allen *v.* Brown, 4 Metc. (Ky.) 342; Worthington *v.* Cary, 1 Metc. (Ky.) 470.

3. Ludlow *v.* Ramsey, 11 Wall. (U. S.) 581.

4. Tommey *v.* Gamble, 66 Ala. 469.

5. Wilkins *v.* Tourtellott, 28 Kan. 825.

6. Geiges *v.* Greiner, 68 Mich. 153, 36 N. W. Rep. 48.

7. Sword *v.* Circuit Judge, 71 Mich. 284, 38 N. W. Rep. 870.

Some late statutes provide for the bringing of attachments when the debt is not due and direct particularly how the affidavit must be made in such cases. These instructions must, of course, be followed literally.

In Florida, when the statute relat-

§ 137. (e) Of debt "due."—When a statute requires that the affidavit shall state that the indebtedness is "due," an

ing to attachments requires that as to a claim not yet due, the affidavit shall state that "the amount of the debt or demand claimed is actually an existing debt or demand," an affidavit stating that defendants are "indebted in the just and full sum," etc., will not suffice. Tanner & Delaney Engine Co. *v.* Hall, 22 Fla. 391.

In Wisconsin the affidavit for attachment must be annexed and must "state that the debt is to become due," and if the writ annexed states the amount to be "due," it will be no ground for vacating the attachment, in that the affidavit having been annexed to the writ, and served at the same time, the inaccuracy in the use of the word "due" in the writ is corrected by the assertion that it so appeared from the affidavits. Spits *v.* Mohr, 57 N. W. Rep. 41, 86 Wis. 387.

In Louisiana the creditor who takes an attachment on a debt not due must take oath as to the existence of the debt, and to one of the grounds for attachment, but need not swear that "said debtor is about to remove his property out of the state before said debt becomes due," since the new code substitutes, "or swears" in place of, "and moreover swears," contained in the old code. Merchants and Farmers' Bank *v.* McKellar, 11 So. Rep. 592, 44 La. Ann. 940.

In Nebraska the code requires that the plaintiff, his agent or attorney who seeks an attachment before the debt is due shall make oath in writing as to the nature and amount of plaintiff's claim, and at least one of the grounds of attachment, but does not require the affiant to swear that he is the plaintiff, his agent or attorney. Reed *v.* Bagley, 24 Neb. 332, 38 N. W. Rep. 827.

In Texas if the whole of the plaintiff's claim is not due at the time, the affidavit for attachment should state how much is due. Sydnor *v.* Totman, 6 Tex. 189. For, where the affidavit for an attachment alleges that defendant is indebted to plaintiff in a certain sum, and the petition shows that part of the debt is not due when the suit is brought, and neither the petition nor affidavit states the amount due, and the amount to become due, the writ will be quashed on motion. An amended petition, afterwards filed by leave of the court, showing the amount due, and the amount to become due, can not help plaintiff. Avery *v.* Zander, 77 Tex. 207, 13 S. W. Rep. 971.

But if the affidavit on which the attachment is based fails to state when the debt will become due, the attachment will not be void. Munzenheimer *v.* Manhattan Cloak and Suit Co., 15 S. W. Rep. 389, 79 Tex. 318. And where an instrument shows on its face that it has not matured, the petition or affidavit in an action thereon, aided by an attachment, need not allege the immaturity of the debt. Panhandle Nat. Bank *v.* Still, 84 Tex. 339, 19 S. W. Rep. 479.

And in proceedings by attachment of claims part due and part not due, an affidavit distinctly stating that two of the notes were due and two were not due, was held to be good, for it need not state in terms how much of the debt is due and how much is not. That is a matter of easy computation. Willis *v.* Mooring, 63 Tex. 340.

An affidavit which does not show when the second note sued on (which is not yet due) will become due is good; for it is sufficient if the affidavit

omission to make such statement will generally be fatal.[1] But in West Virginia, it seems to be sufficient if the affidavit state "the amount at least which the affiant believes the plaintiff is justly entitled to recover in the action," without stating that the "debt is due."[2] And in Ohio an affidavit stating the amount "due" was held to satisfy the statute which required the affiant to state the amount he "believes he ought to recover."[3] In Wisconsin, however, under a statute requiring that the affidavit shall aver that the debt is "due," it is said that the statute means that the affidavit must show that the time of payment has arrived, and that the words "is indebted" show that the debt is due.[4]

In California, in an attachment where the affidavit had failed to aver that the debt was an "actual, *bona fide*, existing debt, due and owing from the debtor," as required by the statute, it was held that such attachment could not be set aside on motion of a junior attaching creditor; that if the defendant does not insist upon the statutory steps being taken for attachment in proper form, a creditor of the defendant can not interfere.[5]

§138. (f) **As near as may be.**—Under a statute requiring the affidavit to contain an averment of the indebtedness "as near as may be," it is held in Michigan that an affidavit stating a certain sum "as near as can be specified by this de-

contains a plain statement of what the indebtedness consists, and what portion is not due. Hinzie *v.* Moody, 20 S. W. Rep. 769, 1 Tex. Civ. App. 26.

In New York an affidavit in an action on notes discounted for the defendant, where the plaintiff waives the damages arising from defendant's fraud in procuring the notes to be discounted, and elects to sue on the express contracts, an affidavit which shows that only a part of the notes are due, and seeks to recover on all of them, is fatally defective. Johnson *v.* Buckel, (Sup.) 20 N. Y. S. 566, 65 Hun (N. Y.) 601.

1. Cross *v.* McMaken, 17 Mich. 511; Thompson *v.* Towson, 1 Har. & M. (Md.) 504; Baumgardner *v.* Dowagiac Mfg. Co., 50 Minn. 381, 52 N. W. Rep. 964; Bowen *v.* Slocum, 17 Wis. 181; Whitney *v.* Brunette, 15 Wis. 61.

2. Ruhl *v.* Rogers, 29 W. Va. 779, 2 S. E. Rep. 798; Delaplain *v.* Rogers, 2 S. E. Rep. 800, 29 W. Va. 783.

3. Sleet *v.* Williams, 21 Ohio St. 82.

4. Trowbridge *v.* Sickler, 42 Wis. 417; Bowen *v.* Slocum, 17 Wis. 181.

5. Fridenberg *v.* Pierson, 18 Cal. 152. See further as to "Dissolution of Attachment," *post*, § 326.

ponent" will satisfy the statute.[1] And that when there is a positive statement of the amount due, the affidavit is not objectionable because of failing to state "as near as may be."[2] But in Wisconsin the statement of an amount "as near as this plaintiff is able to determine" is held not to be sufficient, the courts stating that if the amount can not be known there can be no attachment.[3] And in Pennsylvania an affidavit averring that the debt is a certain sum, or thereabouts, is defective, unless it avers that the amount can not be stated more definitely.[4]

§ 139. (g) **"Over and above" set-offs, counter-claims, etc.** —An attachment will be set aside if the affidavit does not contain an averment of indebtedness to the plaintiff "over and above all counter-claims," when the statute specifies that this must be done.[5] An averment that it is due using the words "over and above all discounts and set-offs," is sufficient.[6] When an action is brought on several distinct items of indebtedness, it is unnecessary that an affidavit should allege that there is no counter-claim.[7]

In New York, where the officer granting the attachment acts in a judicial capacity, to determine whether or not a sufficient showing is made to entitle the plaintiff to the writ,[8] and under a statute which requires an affidavit to show that the plaintiff is entitled to recover a sum therein stated over and above all counter-claims *known to him*, such affidavit must be made by some one presumed to know such facts; or else there must be

1. Barker *v.* Thorn,2 0 Mich. 264.
2. Grover *v.* Buck, 34 Mich. 519.
3. Hawes *v.* Clement, 64 Wis. 152.
4. Simon *v.* Johnson, (Pa. Com. Pl.) 7 Kulp 166.
5. Lyon *v.* Blaksley, 19 Hun (N. Y.) 299; Ruppert *v.* Haug, 87 N. Y. 141, s. c. 62 How. (N. Y.) Pr. 364; Riley *v.* Skidmore, 6 N. Y. S. 107; Dolbeer *v.* Stout, 17 N. Y. S. 184, 21 Civil Proc. R. 359; Norfolk & B. Hosiery Co. *v.* Arnold, 18 N. Y. S. 910; McEntee *v.* Aris, 21 N. Y. S. 857, 66 Hun (N. Y.) 635; Hart *v.* Bernau, 22 N. Y. S. 296, 67 Hun (N. Y.) 652; Thorington *v.* Merrick, 101 N. Y. 5; Buell *v.* Van-Camp, 23 N. E. Rep. 538, 119 N. Y. 160.
6. Lampkin *v.* Douglass, 27 Hun (N. Y.) 517. (Reversing s. c. 10 Abb. (N. Y.) N. C. 342, 63 How. (N. Y.) Pr. 47).
7. United States Net and Twine Co. *v.* Alexander, (City Ct. N. Y.) 18 N. Y. S. 147.

But what is not a sufficient and definite statement, see Pomeroy *v.* Ricketts, 27 Hun (N. Y.) 242; Pickhardt *v.* Antony, 27 Hun (N. Y.) 269.

8. See also *post*, § 144.

also an averment showing how the affiant knows that the debt alleged to be owing by the defendant is over and above all counter-claims. An affidavit, made by the secretary of a corporation in its behalf, which does not show the source of his knowledge, is fatally defective.[1] But an affidavit by the president of a bank, averring that there were no counter-claims within his knowledge, has been held to be sufficient; without a showing that he had knowledge of the transactions between the plaintiff and defendant, out of which the counter-claims might have arisen.[2] Again, it is held that an affidavit, made on behalf of a corporation, stating that the sum demanded is due, "over and above all counter-claims known to plaintiff or deponent," without showing that affiant had knowledge of the plaintiff's business, and, without stating such facts on information and belief, is sufficient.[3] An affidavit by the agent of the plaintiff stating that the sum demanded is "over and above all counter-claims known to deponent or to plaintiffs," and stating also that he made the sale to the defendants, and that he "has personal knowledge of the transfer to plaintiffs" of the notes given therefor, and has them, with a written assignment thereof, in his possession, is sufficient.[4] So is an averment that he has in his possession the note sued on; that defendants have admitted to him its execution and non-payment; and that, as he is informed by plaintiff and believes, the whole amount thereof is due over and above all counter-claims known to plaintiff.[5] But the affidavit of the plaintiff himself, in which the only statement of facts constituting his claim is as "set

1. Geneva Non-Magnetic Watch Co. *v.* Payne, 5 N. Y. S. 68.

2. Essex County Nat. Bank *v.* Johnson, 16 N. Y. S. 71, 71 Hun (N. Y.) 625, 21 Civil Proc. R. 321.

3. Globe Yarn Mills *v.* Bilbrough, (Com. Pl. N. Y.) 21 N. Y. S. 2, 2 Misc. Rep. 100.

4. Gribbon *v.* Back, 35 Hun (N. Y.) 541; Butterworth *v.* Boutilier, 22 N. Y. S. 872, 67 Hun (N. Y.) 650.

5. Mann *v.* Carter, 24 N. Y. S. 591, 71 Hun (N. Y.) 72.

What will justify the conclusion that the affiant had full knowledge of the entire indebtedness of defendants to plaintiff, so that his statement that plaintiff's claim is over and above all counter-claims known to him will be sufficient. See Central Nat. Bank *v.* Ft. Ann Woolen Co. (Sup.), 24 N. Y. S. 640, s. c. 27 N. Y. S. 1114; Barker *v.* Ft. Ann Woolen Co. (Sup.), 27 N. Y. S. 1114; Central Nat. Bank *v.* Ft. Ann Woolen Co., 146 N. Y. 642, 37 N. E. Rep. 827; Selser Bros. Co. *v.* Potter Produce Co., 80 Hun 584.

forth in the complaint in this action," which was referred to and made a part of the affidavit, the complaint being on information and belief without any statement as to the source of his knowledge or grounds of belief, is sufficient.[1] And an affidavit by the attorney of the plaintiff, which negatives the existence of the counter-claim, but which fails to assert that he has any knowledge of the plaintiff's claim except as derived from the plaintiff's affidavit, will not strengthen the plaintiff's ground for the attachment.[2] But an affidavit of the attorney of the plaintiff, which shows that the amount sued for is due over and above all counter-claims, is sufficient, if it appear that the note on which the action was brought was in possession of such attorney; and that, at the time the attachment was applied for, the defendants had made default and the plaintiff was entitled to enter judgment for the full amount of the note; and that, in another action, a referee had reported an indebtedness on the note equal to the sum named in it.[3]

In Wisconsin, under a statute requiring that there must be an averment that the amount is due "over and above all legal set-offs," the omission will be fatal.[4] And one which merely states that the defendant is indebted to the plaintiff in the sum named "over and above all legal set-offs, and that the said indebtedness is for a bill of merchandise purchased by said plaintiffs," does not show that the sum named is "due," because the word "due" is there construed to mean that the day has arrived on which the payment ought to be made.[5]

1. Hitner *v.* Boutilier, 22 N. Y. S. 64, 67 Hun (N. Y.) 203.

Such affidavit is also defective in not specifying grounds for attachment. See *post*, § 142.

2. Hart *v.* Bernau, 22 N. Y. S. 296, 67 Hun (N. Y.) 652.

3. First Nat. Bank of Marietta *v.* Bushwick Chemical Works, 6 N. Y. S. 318, 17 Civil Proc. Rep. 229.

4. Whitney *v.* Brunette, 15 Wis. 61.

5. Bowen *v.* Slocum, 17 Wis. 181.

As to this requirement in Missouri, see Burnett *v.* McCluey, 92 Mo. 230, 4 S. W. Rep. 694.

As to such averment by an affiant other than the plaintiff, and the necessity of disclosing the source of affiant's knowledge, see Mallary *v.* Allen, 15 Abb. (N. Y.) N. C. 338; Crowns *v.* Vail, 2 N. Y. S. 218; Manufacturers' Nat. Bank *v.* Hall, 15 N. Y. S. 208; Lee *v.* Co-operative Life and Accident Ass'n of the United States, 2 N. Y. S. 864; E. W. Bliss Co. *v.* Opera-Glass Co., 15 N. Y. S. 6; Belden *v.* Wilcox, 47 Hun (N. Y.) 331; Crowns *v.* Vail, 4 N. Y. S. 324, 51 Hun (N. Y.) 204.

Where a motion is made to vacate an attachment because of the omission of this statement as required by the statute, the plaintiff can not put in any additional affidavits in support of the attachment. If the affidavit fails to show a right to recover a stated sum "over and above all counter-claims," etc., as required by the statute, the attachment will be dismissed.[1]

§ 140. (h) **Of the "nature" of the indebtedness.**—While some states do not require that the affiant should, in the affidavit of attachment, aver the "nature" of the demand or indebtedness,[2] yet the prevailing rule requires the affiant to state a cause of action with such circumstantial accuracy as is necessary to apprise the opposite party of what is intended to be proved at the trial.[3] The same degree of precision is not required in all states, but it is always well to state the character of the indebtedness as nearly within the words of the statute as may well be done. And when so required, the "nature" of the indebtedness must, at all events, be stated substantially.[4] An affidavit, to comply with the statute requiring it to show "the nature of the plaintiff's claim," need not set forth every item of the account.[5] It is sufficient, in alleging the contract, to give its legal substance an effect; and if it be in writing it is not necessary to produce the original or a copy.[6] But an affidavit which does not state the nature of the debt, whether by note, bill, or breach of contract, is defective; and all proceedings under such an affidavit will be void.[7] An affidavit which states that the defendant is indebted to plaintiff in "the

1. Trow's Printing and Bookbinding Co. *v.* Hart, 60 How. (N. Y.) Pr. 190.

2. Fleming *v.* Burge, 6 Ala. 373; Starke *v.* Marshall, 3 Ala. 44; McCartney *v.* Branch Bank, 3 Ala. 709; Irvin *v.* Howard, 37 Ga. 18; Weaver *v.* Hayward, 41 Cal. 117; Drake *v.* Hager, 10 Iowa 556; O'Brien *v.* Daniel, 2 Blackf. (Ind.) 290.

If it is stated in the declaration. O'Brien *v.* Daniel, 2 Blackf. (Ind.) 290.

3. Caldwell *v.* Haley, 3 Tex. 317.

4. Deering *v.* Collins, 38 Mo. App. 80; *In re* Hollingshead, 6 Wend. (N. Y.) 553; Smith *v.* Luce, 14 Wend. (N. Y.) 237; Matter of Marty, 2 Barb. (N. Y.) 436; Berger *v.* Smull, 39 Pa. St. 302.

5. Theirman *v.* Vahle, 32 Ind. 400.

6. Condouris *v.* Imperial Turkish Tobacco and Cigarette Co., (Com. Pl. N. Y.) 22 N. Y. S. 695, 3 Misc. Rep. 66.

7. Sullivan *v.* Fugate, 1 Heisk. (Tenn.) 20.

sum of $24,000 damages and interest upon the covenants in the deed" annexed thereto, does not sufficiently specify "the nature and amount of the indebtedness" as required by the attachment law of Illinois, where the action is commenced by *præcipe*, and no declaration has been filed. It should state the facts relied on as breaches of the covenants, and the damages sustained because of each breach.[1]

The "nature of the plaintiff's claim" is sufficiently stated in an affidavit which avers it to be for a "balance due on account of goods sold and delivered."[2] And the words "for goods sold and delivered, for which they have promised but failed to pay," sufficiently states a cause of action. If the goods were not to be paid for on delivery, but were sold on credit, it rests upon the defendant to show that such was the case; it is not necessary for the plaintiff to deny that it is so in his affidavit.[3] But an affidavit for attachment will not be sufficient if it fails to show a cause of action. If it merely states that "plaintiffs have from time to time * * * shipped merchandise to the defendant and advanced money to him, and there is an account current between them," on which account a certain sum is due, it will be ineffectual.[4] Nor is the nature of the demand sufficiently set forth to sustain an attachment of real estate, when the suit is upon an account annexed and the statements of the items are "balance as per settlement, $2,123;" "Mdse. as per bill of $39.75."[5] However, in an action brought for goods sold,

1. Fisher *v.* Secrist, (Cir. Ct.) 48 Fed. Rep. 264.

Under a statute requiring a statement of "the nature of the plaintiff's claim and the amount, at the least, which the affiant believes the plaintiff is justly entitled to recover in the action or suit," etc., it was held that the affidavit must contain the words "at the least" or their equivalent, because they are a material qualification of the essential element, *i. e.*, the amount stated. Altmeyer *v.* Caulfield, 17 S. E. Rep. 409, 37 W. Va. 847.

And the word "justly" is a material qualification of the rest of the phrase, "entitled to recover," and it, or its equivalent, must be used. Reed *v.* McCloud, 18 S. E. Rep. 924, 38 W. Va. 701.

2. Theirman *v.* Vahle, 32 Ind. 400.

3. Kiefer *v.* Webster, 6 Hun (N. Y. Supr. Ct.) 526.

4. Wessels *v.* Boettcher, 23 N. Y. S. 480, 69 (Hun) N. Y. 306, s. c. 34 N. E. Rep. 513, 138 N. Y. 654.

5. Bartlett *v.* Ware, 74 Me. 292.

an affidavit which avers a sale is sufficient, without averring a delivery of the goods.[1] An affidavit describing the claim sued on as being for "the services of the plaintiff, as the attorney of the defendant, rendered in prosecuting certain suits upon his retainer, and for drawing and engrossing certain instruments in writing," "which services were performed, and money advanced, between" the dates named, has been held to contain a direct and positive averment of indebtedness for services performed and money advanced, and not a mere allegation of indebtedness without any facts.[2]

The character of the contract, "express or implied," or "upon judgment or decree" when so specified in the statute, must be so stated,[3] and when stated in these words no further averment of the nature of the indebtedness need be made;[4] and an affidavit stating that the defendant is indebted "on an account stated, a contract for the direct payment of money," etc., sufficiently shows the elements of an implied contract at least, and it need not state whether the contract was express or implied.[5] But the statement in the affidavit of a demand arising solely from a breach of duty, without any statement that the duty arose by contract, will not be sufficient under the statute permitting attachments on demand "arising upon contract, judgment, or decree."[6] A statement that the defendant is indebted to the plaintiff in a named sum "for work, labor

1. Hamilton *v.* Steck, 5. N. Y. S. 831.

2. Wenzell *v.* Morrissy, 2 N. Y. S. 250, 22 N. E. Rep. 271, 115 N. Y. 665.

In an affidavit made by the attorney in behalf of a non-resident plaintiff it is sufficient that the statement as to the amount and nature of the plaintiff's indebtedness appear to have been made "upon information and belief derived from and founded upon the written admissions of the defendant," then in the attorney's possession. Howell *v.* Kingsbury, 15 Wis. 272.

3. People *v.* Blanchard, 28 N. W. Rep. 669, 61 Mich. 478; Buehler *v.* De Lemos, 48 N. W. Rep. 42, 84 Mich. 554; Exp. Gilbert, 7 Wend. (N. Y.) 490; Hollingshead's Case, 6 Wend. (N. Y.) 553; Hawley *v.* Delmas, 4 Cal. 195; Simpson *v.* McCarthy, 20 Pac. Rep. 406, 78 Cal. 175.

4. Simpson *v.* McCarty, 20 Pac. Rep. 406, 78 Cal. 175; Klenk *v.* Schwalm, 19 Wis. 111.

5. Simpson *v.* McCarty, 20 Pac. Rep. 406, 78 Cal. 175.

6. Pope *v.* Hibernia Ins. Co., 24 Ohio State, 481.

Plaintiff's affidavit stated that defendant is indebted to him in a sum named on a certain promissory note

and services done and performed by him for the defendant at its special instance and request," sufficiently states that such indebtedness "is due upon contract express or implied."[1] An affidavit stating that the affiant has commenced an action for a named sum "now due and payable to the plaintiff from the defendant on account of money had and received," states sufficiently that the plaintiff's claim arises *ex contractu*.[2] And an affidavit stating that a cause of action exists in favor of the plaintiff against the defendant, arising upon a contract made and executed by the defendant, which is "more particularly set forth in the copy of complaint hereto annexed," a copy of the verified complaint setting forth the contract being thereto annexed, is sufficient, although it contain no express words making the contract a part of it.[3] But an affidavit, stating that the claim is "for damages in not delivering goods purchased," does not sufficiently show that the claim is "for a debt or demand arising on a contract, judgment or decree."[4] However, under the rule of law, which requires a substantial compliance only, an affidavit that an amount is due on the *fieri facias* instead of on the judgment itself, is sufficient.[5]

A judgment either upon tort or contract is a contract within the meaning of the New York code, providing that attachments may be granted in actions for damages for "breach of con-

of a stated amount, date, and maturity, made to the order of one of the defendants, named, and indorsed by defendants. It was held that the affidavit sufficiently alleged the plaintiff's ownership of the note. Bank of California *v.* Boyd, 25 Pac. Rep. 20, 86 Cal. 386.

1. Ruthe *v.* Green Bay & Minn. R. R. Co., 37 Wis. 344.

2. Hart *v.* Barnes, 24 Neb. 782, 40 N. W. Rep. 322.

3. Crandall *v.* McKaye, 6 Hun (N. Y. Supreme Ct.) 483.

But an affidavit stating that the cause of action exists against the defendant for the breach of an express contract in writing by which the defendant, in consideration of 2,000 gulden, agreed to pay the plaintiff $1,000, and 5 per cent. on all profits made in disposing of a certain invention; that it was sold for $50,000 and that plaintiff's share of the profits was $10,000; the contract not being set out; the time when payments were to be made not being stated; nor was it stated that the whole $50,000 or any part, was clear profit, and the computation by which $10,000 was found to be due plaintiff not being given, the affidavit was held to be insufficient. Labalt *v.* Schulhof, 4 N. Y. S. 819.

4. Rouss *v.* Wright, 14 Neb. 457.

5. Force *v.* Hubbard, 26 Ga. 289.

tract, express or implied." Therefore an attachment granted in an action on a foreign judgment in attachment will not be dismissed because the affidavit (and complaint) does not show the character of the claim on which such judgment was obtained.[1]

The "amount and nature" required by the statute to be stated in the affidavit is sufficiently set forth in an affidavit of the amount due to the plaintiff from the defendant "for which he has given a note,"[2] or "is justly indebted," etc., "by his instrument in writing."[3] And an affidavit stating that "the claim in this action is for money due on three promissory notes executed by defendants to plaintiffs" sufficiently describes the nature of the claim.[4]

§ 141. (i) Copy of instruments sued on—Production of note, etc.—In the absence of a statute controlling the production of the contract or instrument on which action is brought, the affiant may refer to such instruments as assignments, inventories, etc., and the parts referred to may be set forth; or at least produced when the motion is made therefor.[5] Some states require the production, before the officer taking the affidavit, of the instrument on which the claim is based, and some require the affidavit to contain a copy thereof. Under a statute requiring the affidavit to contain "a copy of the instrument in writing," it was held that an affidavit of the amount due upon notes, copies of which were appended to the declaration, filed

1. Gutta Percha and Rubber Mfg. Co. *v.* City of Houston, 108 N. Y. 276, 15 N. E. Rep. 402.

An affidavit which fails to show a breach of the contract set forth is defective. Smadbeck *v.* Sisson, 66 How. (N. Y.) Pr. 220, 225. Compare Reilly *v.* Sisson, 66 How. (N. Y.) 224, 228, s. c. 31 Hun (N. Y.) 572.

Under the section of the New York code which provided that, in order to entitle plaintiff to attachment in an action for breach of contract, the affidavit must show that plaintiff is entitled to recover a sum stated therein, over and above all counter-claims, the averment of an account stated between the plaintiff and the defendant by which a certain balance was found to be due from the latter to the former is a sufficient averment of breach of contract. Johnston *v.* Ferris, 14 Daly (N. Y.) 302.

2. Haywood *v.* McCrory, 33 Ill. 459.

3. Phelps *v.* Young, 1 Ill. (Breeze) 327.

4. Fremont Cultivator Co. *v.* Fulton, 103 Ind. 393.

5. Smith *v.* Arnold, 33 Hun (N. Y.) 484.

the same day, was sufficient.[1] And a statute, requiring the production by the affiant of "bond or bonds, bill or bills, protested bill or bills of exchange, promissory note or notes, or other instrument in writing, account or accounts, by which the said debtor is so indebted" has been construed *not* to intend that the creditor is bound to produce *all* the written evidence which may be in his possession, and which might be used before a jury to establish the debt.[2]

Under a statute requiring that the note on which the defendant is indebted shall be produced before the officer taking the affidavit, a *prima facie* case of indebtedness may be shown by a bill of exchange written in a foreign language and unaccompanied by a translation.[3]

§ 142. **Averment of grounds for attachment.**—The absolute necessity of stating the grounds for attachment has already been mentioned.[4] The existence of the state of things, because of which the statute will permit a creditor to have this writ for the seizure of his debtor's effects (*i. e.*, grounds for attachment), must exist at the time the writ issues; for, if the sufficiency of the writ is questioned it can only be justified by the actual existence of the fact alleged, at the time alleged, and not by the affiant's belief of its existence;[5] and such state of things must not only exist, but must be averred in the affidavit. The jurisdiction of the court to issue the writ depends upon such averment. If an affidavit to procure an attachment omits to state the ground of the action, the court is without jurisdiction and such defect in the affidavit can not be remedied by amendment. The attachment must be set aside.[6] If, however, the affidavit

1. Woods *v.* Watkins, 40 Pa. St. 458.

2. Dawson *v.* Brown, 12 Gill & J. (Md.) 53.

Under a statute requiring the plaintiff to produce the evidence of indebtedness, and to file it in the case when the affidavit is made, the court says it is not necessary, although the better practice, to certify this production in the certificate that sets forth the affidavit. Howard *v.* Oppenheimer, 25 Md. 350; Dean *v.* Oppenheimer, 25 Md. 368.

3. De Bebian *v.* Cola, 64 Md. 262.

4. See *ante*, § 132.

5. Sublett *v.* Wood, 76 Va. 318; Foster *v.* Illinski, 3 Ill. App. 345.

6. Zeregal *v.* Benoist, 33 How. (N. Y.) Pr. 129; Van Kirke *v.* Wilds, 11 Barb. (N. Y.) 520; Anderson *v.* Sut-

specifies any of the statutory grounds for issuing the writ, however defectively stated, it will not be void because of such defect, but may be perfected by amendment.[1]

If the affidavit state the ground for attachment, in the language of the statute, it will always be sufficient.[2] But there is no necessity that the affidavit follow the words of the statute; a substantial compliance with its terms is sufficient.[3] Jurisdictional facts need only be set forth with substantial accuracy.[4] Where the attachment is sought against joint obligors, the general rule is that the affidavit must show that they all come within the requirements of the statute.[5] But it seems not to be necessary that all of the joint obligors have given the same grounds for attachment.[6]

The statement of one of the statutory grounds is sufficient foundation for the issuance of the writ, but other grounds may be also stated,[7] if the allegations are not thereby made inconsistent.[8] Where, however, the statute prescribes the co-existence of two circumstances as one ground for attachment, such ground for attachment is not averred unless there is a statement of both conditions. If the statute prescribed as ground for attachment that the debtor has not in the state property "enough to satisfy the plaintiff's demand *and* the collection of the demand will be endangered by delay in obtaining judgment," an attachment can not be sustained unless it be alleged and shown, not only that the property is not sufficient to satisfy the demand, but also that the collection would be endangered by the delay.[9]

In states where a petition is filed as the commencement of a

ton, 2 Duv. (Ky.) 480; Meinhard *v.* Neill, 85 Ga. 265, 11 S. E. Rep. 613, followed by Moore *v.* Neill, 86 Ga. 186, 12 S. E. Rep. 222; Waxelbaum *v.* Neill, 86 Ga. 186, 12 S. E. Rep. 222.

1. Booth *v.* Rees, 26 Ill. 45.

2. Emmitt *v.* Yeigh, 12 Ohio St. 335; Curtis *v.* Moore, 3 Minn. 29; Rubinsky *v.* Ullman, 4 Pa. Dist. Rep. 126; Prince *v.* Ullman, 4 Pa. Dist. Rep. 126.

3. Creaser *v.* Young, 31 Ohio State 57; C. D. Smith Drug Co. *v.* Casper Drug Co., (Wyo.) 40 Pac. Rep. 979.

4. Franklin *v.* Claflin, 49 Mo. 24; Altmeyer *v.* Caulfield, 37 W. Va. 847; Sandheger *v.* Hosey, 26 W. Va. 221.

5. Courrier *v.* Cleghorn, 3 Green (Ia.) 523.

6. Tanner & Delaney Engine Co. *v.* Hall, 22 Fla. 391. See further as to "Joint Debtors," and "Partners," *ante*, §§ 80 and 81.

7. See *post*, § 145.

8. See *post*, § 146.

9. Dunn's Trustee *v.* McAlpin, 90 Ky. 78, 13 S. W. Rep. 363.

suit, and such petition contains the requisites of an affidavit—the same being sufficient for the issuance of the writ of attachment—it is not necessary to set forth those facts in a separate affidavit; the petition, being in itself an affidavit, may be used for the purposes of an affidavit for attachment.[1] The proceedings to procure a writ of attachment in aid of suits already begun will be considered in a subsequent part of this work.[2]

Owing to the fact that in some states the officer allowing the writ to issue acts simply in a ministerial capacity, while in others he acts also in a judicial capacity by determining whether or not sufficient ground is stated in the affidavit to give cause for the writ to be sued out, different degrees of particularity are required in the statement of the grounds for attachment, and these will be considered respectively.

§ 143 (a) Where the averment of a fact alone in the affidavit is sufficient—The officer acting in a ministerial capacity only.—Wherever the sole fact of the filing of the required affidavit gives the officer jurisdiction to issue a writ, the grounds for an attachment may be stated in the affidavit in the language of the statute, without specifying more particularly the facts intended to be alleged;[3] that is to say, the affiant need not state the probative facts out of which the cause grew,[4] but only the ultimate facts required by the statutes.[5] In some of these states it has been held that the statement in the affidavit of the facts and circumstances giving rise to the cause of action will be treated as surplusage.[6] While in another, such statement is held to be a matter of good practice though not a necessity,

1. Hoffman *v.* Hardeman, 1 S. W. Rep. 575; Wirt *v.* Dinan, 44 Mo. App. 583; Shirley *v.* Byrnes, 34 Tex. 625; Maddox *v.* Fox, 8 Bush (Ky.) 402; Burnam *v.* Romans, 2 Bush (Ky.) 191.

2. See *post*, § 215.

3. Phillips *v.* Wood, 31 Vt. 322; Tallon *v.* Ellison, 3 Neb. 63; Ellison *v.* Tallon, 2 Neb. 14; Ferris *v.* Carlton, 8 Phila. 549; Sharpless *v.* Zigler, 92 Pa. St. 467.

4. And not in the entire wording of the statute, if the grounds stated would be inconsistent. See *post*, § 146. Or possibly if perjury could not be assigned. Miller *v.* Munson, 34 Wis. 579.

5. Crawford *v.* Roberts, 8 Ore. 324; Wheeler *v.* Farmer, 38 Cal. 203.

6. Reyburn *v.* Brackett, 2 Kan. 227; Connelly *v.* Woods, 31 Kan. 359; Pitkins *v.* Boyd, 4 Greene (Ia.) 255.

In Missouri an agent making an affidavit for an attachment need not

the words of the statute being in themselves sufficient.[1] And an affidavit for attachment is generally sufficient, if it is in substantial compliance with the terms of the statute, though it does not literally follow the language thereof.[2] Statutes of this class do not intend the affidavit so much for the satisfaction of the mind of the officer as to the existence of grounds as to the rectitude of the application for the attachment. That is, to commit on oath the applicant to the truth of his allegations, in order that he may be legally liable therefor, if they are false.[3] The certainty of the statements of facts required is generally such that the affiant may be held for perjury if the same be not true.[4] But so far as the statute permits the issuance of the attachment on the affiant's belief of the existence of certain grounds,[5] this rule will, of course, be inapplicable, though even then the circumstances must be averred with the same precision.

In some of these states it is said that the belief of the affiant does not lay a foundation for attachment.[6] And again it is further held, that an averment on belief that the matters set forth are true is not a nullity; and by failure to object, the irregularity is waived.[7]

§ 144. (b) **Where affidavit must contain evidence to establish ground for attachment—The officer acting in a judicial capacity.**—In states where the officer to whom the application is made for a writ of attachment acts in a judicial capacity,

disclose his means of knowledge. An affidavit for an attachment, made by the same person who signs the petition as plaintiff's attorney, is there sufficient. Gilkeson *v.* Knight, 71 Mo. 403.

1. Harrison *v.* King, 9 Ohio State 388; Coston *v.* Paige, 9 Ohio State 397.

2. Altmeyer *v.* Maulfield, 17 S. E. Rep. 409, 37 W. Va. 847; Sandheger *v.* Hosey, 26 W. Va. 221.

In Idaho an affidavit is sufficient which states that the plaintiff has no security by mortgage or lien upon real or personal property, even though it omits the other clause of the statute "or pledge of personal property." Glidden *v.* Whittier, 46 Fed. Rep. 437.

3. Sharpless *v.* Ziegler, 92 Pa. St. 467.

4. Miller *v.* Munson, 34 Wis. 579; Goodyear Rubber Co. *v.* Knapp, 61 Wis. 103.

5. McNamara *v.* Ellis, 14 Ind. 516.

6. Dunlevy *v.* Schurtz, 17 Ohio St. 640; Garner *v.* White, 23 Ohio St. 192.

7. Landfair *v.* Lowman, 50 Ark. 446, 8 S. W. Rep. 188.

to determine whether or not the grounds alleged in the affidavit state a proper cause under the statute for such remedy, the facts and circumstances which are claimed to give a right to it should be stated in such a manner that the officer, whose duty it is to allow or disallow the writ, may judge of the propriety of granting it.[1] Some of these states hold that this must be by the same sort of evidence as that required on the trial; by the oath of a witness, and not merely by his oath to his information and belief thereof.[2] The facts on which the belief is founded must appear.[3] "Proof to the satisfaction of" means legal proof.[4] It means a *prima facie* case.[5] The affidavit is defective when it alleges conclusions and does not set up facts on which the officer may base a judgment.[6] If the facts stated call for an exercise of judgment, the attachment will be sustained; although the case be neither strong nor conclusive, still, if enough is set forth in the affidavit to require the officer to ex-

1. Pratt *v.* Pratt, 2 Chand. (Wis.) 48; Lorrain *v.* Higgins, 2 Chand. (Wis.) 116, 2 Pinney (Wis.) 454; Kokomo Straw Board Co. *v.* Inman, 5 N. Y. S. 888, 53 Hun (N. Y.) 39.

2. Morrison *v.* Lovejoy, 6 Minn. 183; Pierse *v.* Smith, 1 Minn. 82; Murray *v.* Johnson, 1 Minn. 222; Keigher *v.* McCormick, 11 Minn. 545; Pride *v.* Indianapolis, D. & W. Ry. Co., 4 N. Y. S. 15; Appleton *v.* Speer, 6 N. Y. S. 511; Kingsland *v.* Cowman, 5 Hill. (N. Y.) 608.

3. Newman *v.* Hexter, 4 McArthur (D. C.) 88.

4. Curwensville Mfg. Co. *v.* Bloom, (Pa. Com. Pl.) 10 Pa. Co. Ct. Rep. 295.

An officer issuing the writ without proof on oath is liable in trespass. Vosburgh *v.* Welch, 11 Johns. (N. Y.) 175.

5. Mott *v.* Lawrence, 17 How. (N. Y.) Pr. 559.

An affidavit of fraud alleged the facts constituting fraud upon information and belief, and one of the affiants averred that he stated to defendant the facts; that defendant did not deny them, but promised to immediately call and settle or give security. This was held to be sufficient evidence of the fraud to warrant the attachment. Blake *v.* Bernhard, 6 Thomp. & C. (N. Y.) 74, 3 Hun (N. Y.) 397.

When an affidavit setting out the contract under which the work (the value of which is sued for) was done, and stating the fact that the work was done, with a bill of particulars accompanying the complaint, a cause of action is sufficiently stated and the grounds thereof specified. Central R. R. & Banking Co. *v.* Georgia Const. & Invest. Co., 32 S. C. 319, 11 S. E. Rep. 192.

6. Howell *v.* Dickerman, Circuit Judge, 50 N. W. Rep. 306, 88 Mich. 361; Byles *v.* Rowe, 64 Mich. 522, 31 N. W. Rep. 463; *Ex parte* Robinson, 21 Wend. (N. Y.) 672; Hodgman *v.* Barker, 14 N. Y. S. 574; Brown *v.* Keogh, 14 N. Y. S. 915.

ercise his judgment in the matter, and the facts legally tend to support the allegation, the affidavit will be sufficient. It is only where there is a total want of evidence upon some essential point that the court fails to acquire jurisdiction.[1] There must be some evidence tending to establish facts conferring jurisdiction.[2] These facts and circumstances must be within the personal knowledge of the affiant.[3] Mere belief on information is not information.[4] Thus, allegations made on belief "from reports and information," will not support an attachment.[5] But affidavits made on information, the source of which is given showing plaintiff's inability to procure informant's testimony, will be considered.[6]

The holding of the courts of New York, regarding the making of affidavits for attachment on information and belief, is not quite so rigid as some others. They say that "hearsay evidence is generally excluded upon the trial of issues of fact in actions. As a general rule, it is not good common law evidence. But in collateral proceedings or matters of practice, where orders in the progress of actions are applied for, judges frequently act upon facts stated upon information and belief. In such proceedings absolute certainty is not expected; the evi-

1. Tanner & D. E. Co. *v.* Hall, 22 Fla. 391; Conklin *v.* Dutcher, 5 How. (N. Y.) Pr. 386; Furnam *v.* Walter, 13 How. (N. Y.) Pr. 348; Niles *v.* Vanderzee, 14 How. (N. Y.) Pr. 547; Talcott *v.* Rosenberg, 8 Abb. (N. Y.) Pr. N. S. 287; Schoonmaker *v.* Spencer, 54 N. Y. 366; Skinnion *v.* Kelley, 18 N. Y. 355; Easton *v.* Malavazi, 7 Daly (N. Y.) 147; Allen *v.* Meyer, 7 Daly (N. Y.) 229.

2. National Broadway Bank *v.* Barker, 16 N. Y. S. 75, 61 Hun (N. Y.) 625.

3. *In re* Bliss, 7 Hill (N. Y.) 187; Norfolk & N. B. Hosiery Co. *v.* Arnold, 18 N. Y. S. 910; Kahle *v.* Muller, 11 N. Y. S. 26, 57 Hun (N. Y.) 144; Hodgman *v.* Barker, 14 N. Y. S. 574.

4. Steuben County Bank *v.* Alberger, 78 N. Y. 252; Matter of Faulkner, 4 Hill (N. Y.) 598; Claflin *v.* Baere, 57 How. (N. Y.) Pr. 78; King *v.* Southwick, 66 How. (N. Y.) Pr. 282.

5. Tallman *v.* Bigelow, 10 Wend. (N. Y.) 420.

6. Buell *v.* Van Camp, 8 N. Y. S. 207.

A plaintiff will not be excused for a failure to produce the affidavits of the persons from whom knowledge of the facts was derived, and on which an application for an attachment is based, because of mere inconvenience, nor authorize an attachment on an affidavit based on information and belief, where it appears that the persons having personal knowledge of the facts were accessible to plaintiff's attorney, and no reason is given why their affidavits were not obtained. Brewster *v.* Van Camp, 8 N. Y. S. 588.

dence is sufficient if convincing and satisfactory. It is usually by affidavit *ex parte*, and is not subject to the test of cross-examination. All that is required is that the information furnished by the affidavit shall be such that a person of reasonable prudence would be willing to accept and act upon it. The mere averment, however, of a fact upon information and belief without more is not sufficient, but the sources of the information and the grounds of the belief must be stated so that the judicial officer, to whom the affidavit is presented, may judge whether the information and belief have a proper basis to rest on, and if he is satisfied that they have, then the affidavit is sufficient to invoke his jurisdiction and to be submitted to his determination. And such is the rule recognized, we believe, in all cases on this subject. The rule, which requires an affidavit to state the sources of the information and the ground of belief, implies, that with such statements the affidavit will be sufficient, although the affiant has no personal knowledge of the principal facts necessary to be established.'"[1]

If copies of affidavits that have been prepared in other attachment cases against the defendant are filed to show the source from which the plaintiff obtained his information concerning the facts upon which the application is based, the plaintiff must still show by affidavit that he believes the statements in such affidavits to be true.[2]

When an affidavit is made by an agent or attorney he must have such knowledge that he can give legal evidence of the facts necessary to authorize the court to act.[3] When the relation of the agent making the affidavit appears to have been such as to enable him to have the requisite knowledge to state

1. Buell *v.* Van Camp, 23 N. E. Rep. 538, 119 N. Y. 160; Geneva Non-Magnetic Watch Co. *v.* Payne, 5 N. Y. S. 68.

2. Brewster *v.* Van Camp, 8 N. Y. S. 588.

3. Tim *v.* Smith, 93 N. Y. 87; Kokomo Straw Board Co. *v.* Inman, 5 N. Y. S. 888, 53 Hun (N. Y.) 39.

An affidavit made by plaintiff's attorney of record who is not shown to be plaintiff's attorney for any other purpose than to prosecute that action, will be presumed to be made on information and belief, though it state the facts positively, and it will be insufficient when it does not state the grounds and sources of such information and belief. Crowns *v.* Vail, 4 N. Y. S. 324, 51 Hun (N. Y.) 204.

a fact, his averment of it may be taken as proof upon which the officer granting the attachment may judicially act; and a writ issued thereon will be sustained.[1]

An affidavit in an action to recover unliquidated damages must state the facts which the plaintiff relies upon to prove his damage. This is necessary in order that the court may judge whether he has sufficient evidence of damage, or whether his allegation of damage is mere matter of speculation. An averment that the plaintiff has been damaged to the extent of $5,000 is a mere expression of his opinion, which the court can not consider.[2]

§ 145. **Of several grounds.**—In the affidavit for attachment, a statement of *one* of the statutory grounds positively is sufficient to procure the issuance of the writ, but the affiant may state as many co-existent causes as he may choose if in so doing he states them cumulatively. If any one of them be

1. Buhl *v.* Ball, 41 Hun (N. Y.) 65.

An affidavit made by the plaintiff's agent, which alleges that affiant is in charge of plaintiff's office where the sale was made, and manages the business there; that it was he who sold the goods to the defendant for which the action was brought, and that he represented plaintiffs in the action, sufficiently shows affiant's means of knowledge. Hamilton *v.* Steck, 5 N. Y. S. 831.

But an affidavit made by a son of the plaintiff which states that the plaintiff is absent from the state, and that he is entitled to recover a certain sum for breach of a contract, without showing that the affiant was agent or otherwise, or that he personally conducted the business out of which the claim arose, does not disclose any circumstances tending to show that he had any knowledge to enable him to state the facts in the affidavit alleged positively and of his own knowledge, is insufficient. McVicker *v.* Campanini, 5 N. Y. S. 577.

And it seems further that the insufficiency in making the principal averment upon information and belief is not supplied by a statement that the plaintiff's knowledge and belief was derived from books, papers, agreements and accounts of the parties to the action in his possession and from knowledge of the affairs of the plaintiff's company and its relations with the defendant which he acquired while in the plaintiff's employ as *bookkeeper*, for fourteen months before his appointment as receiver. McCulloh *v.* Aeby & Co., 9 N. Y. S. 361.

2. Westervelt *v.* Agrumaria Sicula Societé Anonima di Trasporti Maritimi, 11 N. Y. S. 340, 58 Hun (N. Y.) 147.

true it will sustain the writ.[1] The different grounds may be stated conjunctively, but not in the alternative.[2] If it aver two inconsistent grounds: as, that the debtor has secreted his property and that he has disposed of it, it will be insufficient.[3] But different *consistent* acts of the same statutory ground may be stated alternatively, as for example that defendant "is about to assign, dispose of, or conceal" her property, with intent to defraud.[4] An affidavit is not contradicting and insufficient in its statements where it alleges that one of two debtors has absconded, and the other is a non-resident, and yet avers that they are fraudulently disposing of their property in the state.[5]

A good statement of one ground for attachment will be sufficient, although another is stated which is bad, or which, if good, is badly stated.[6] And when two grounds are averred in the affidavit, if one is positively sworn to and sustained by proof, it will support the attachment, whether the other is positively sworn to or not.[7] If three grounds are averred in the affidavit and an objection be raised to two of them and sustained, the third, not being objected to, will support the writ.[8]

Where the statute, which defines grounds for attachment, separates them into groups, or subdivisions, an affidavit which follows the language of the statute, in setting forth a cause

1. Rosenheim *v.* Fifield, 12 Ill. App. 302; Lawver *v.* Langhans, 85 Ill. 138; McCollem *v.* White, 23 Ind. 43; Prins *v.* Hinchliff, 17 Ill. App. 153; Kennon *v.* Evans, 36 Ga. 89; Cleveland *v.* Boden, 63 Tex. 103; Sheldon *v.* Kivett, 14 S. E. Rep. 970, 110 N. C. 408; Luttrell *v.* Martin, 112 N. C. 593, 17 S. E. Rep. 573. See Mayer *v.* Zingre, 18 Neb. 458.

2. Simon *v.* Johnson, (Pa. Com. Pl.) 7 Kulp 166.

3. Pearre *v.* Hawkins, 62 Tex. 434.

An averment that defendants "have disposed of," "and are about to dispose of," their property, with intent, etc., is bad. Hale *v.* Prote, 75 Hun 13, 26 N. Y. S. 950; Johnson *v.* Buckel, 20 N. Y. S. 566.

4. Jones *v.* Peek, 101 Mich. 389, 59 N. W. Rep. 659.

An affidavit stating that the defendant has assigned and disposed of his property, with intent to delay and defraud his creditors, *and* that he is about to assign and dispose of his property, with like intent, is not objectionable for inconsistency. Nelson *v.* Munch, 23 Minn. 229.

5. Tanner & D. E. Co. *v.* Hall, 22 Fla. 391.

6. Lawver *v.* Langhans, 85 Ill. 138; Ruhl *v.* Rogers, 29 W. Va. 779, 2 S. E. Rep. 798; Delaplaine *v.* Rogers, 2 S. E. Rep. 800, 29 W. Va. 783.

7. Dunlap *v.* McFarland, 25 Kan. 488.

8. Keith *v.* Stetter, 25 Kan. 100.

embraced by one of these groups or subdivisions, is sufficient.[1] And though the statement of the grounds for attachment be made in the alternative by the use of the disjunctive conjunction "or," yet if they are of the same class and character, being the consummation of one wrongful act, the statement will be deemed consistent, and an attachment issued thereon, sustained.[2] Ordinarily, however, an alternative statement or the averment of two grounds disjunctively will be void for uncertainty,[3] as will be shown in the next succeeding section.

§ 146. **By alternative statement—Use of the disjunctive conjunction "or."**—An alternative statement in the averment of grounds for attachment is generally insufficient, because the affiant swearing to one of two grounds does not say which, and facts so stated are too uncertain to support attachment.[4] The averment of two grounds for attachment, which separates them by the disjunctive, is bad, although either of

1. Tessier *v.* Englehart, 18 Neb. 167. Same principle in Jones *v.* Peek, 101 Mich. 389, 59 N. W. Rep. 659.

2. Wood *v.* Wells, 2 Bush (Ky.) 197.

3. Rogers *v.* Ellis, 1 Handy 48, 1 Disney (Ohio) 1.

4. Culbertson *v.* Cabeen, 29 Tex. 247; Garnier *v.* Burleson, 26 Tex. 348; Carpenter *v.* Pridgen, 40 Tex. 32; Dintruff *v.* Tuthill, 17 N. Y. S. 556, 62 Hun (N. Y.) 591; Cronin *v.* Crooks, 27 N. Y. S. 822, 76 Hun 120, affirmed in 143 N. Y. 352; Witners *v.* Pearson, (Cal.) 14 Pac. Rep. 304; Wilke *v.* Cohn, 54 Cal. 212; Brafman *v.* Asher, 78 Ga. 32; Allen *v.* Fleming, 41 S. Car. 196; Parsons *v.* Stockbridge, 42 Ind. 121; Stacy *v.* Stichton, 7 Iowa 399; Dickenson *v.* Cowley, 15 Kan. 269; Goodyear R. Co. *v.* Knapp, 61 Wis. 103; Kegel *v.* Schrenkheisen, 37 Mich. 175.

But an affidavit which alleges that defendant "has assigned, disposed of, *and* concealed, *and* is about to assign, dispose of, and conceal its property, with intent to defraud its creditors," is not inconsistent. Detroit Free Press Co. *v.* Drs. K. & K. U. S. M. & S. Ass'n, 64 Mich. 605, 31 N. W. Rep. 537; Jones *v.* Peek, 101 Mich. 389, 59 N. W. Rep. 659; and see Morrison *v.* Fake, 1 Pinney (Wis.) 133. *Contra*, American Horse Exchange *v.* Strauss, 27 N. Y. S. 282, 75 Hun 192. So, too, the averment that he has "assigned, disposed of, *or* secreted," etc., is good. Smith, Perkins & Co. *v.* Wilson, 76 Hun 565, 28 N. Y. S. 212.

Several acts which constitute fraud may be stated conjunctively, but not alternately. Simon *v.* Johnson, (Pa. Com. Pl.) 7 Kulp 166.

In Mississippi while it is erroneous to state grounds for attachment in the disjunctive form, yet the attachment is not thereby void; but may be amended. Bishop *v.* Fennerty, 46 Miss. 570. See further as to "Amendment of Affidavit," *post*, § 152.

them alone might be sufficient.[1] But while such an affidavit will be bad on its face, if one of the alleged grounds is evidently untrue,[2] yet if the alternative statement is made, not as two distinct causes for attachment, but as two phases of the same fact, constituting but one single cause, they may be alleged in the alternative.[3] When the statute employs the disjunctive conjunction "or" in connecting phrases, which, taken together, state but one ground for attachment, an affidavit following the words of the statute is not objectionable.[4] As for example, an averment that the debtor "is converting *or* is about to convert his property into money, *or* is otherwise about to dispose of his property with intent," etc., states but one ground for attachment.[5] An averment that the debtor "is about removing or is so concealing his effects" as to defeat the creditor;[6] or that the defendant "is about to convert his property, or a part thereof, into money, for the purpose of placing it beyond the reach of creditors," is not sufficient as being in the alternative.[7] An averment that the debtor has "absconded or concealed himself," etc., forms but one ground for attachment;[8] and where it is doubtful whether he has "departed or keeps concealed," the fact may be alleged in the alternative form.[9] The statement

1. Allen *v.* Fleming, 14 Rich. (S.C.) 196.

2. Dunnenbaum *v.* Schram, 59 Tex. 281.

3. Parsons *v.* Stockbridge, 42 Ind. 121; Klenk *v.* Schwalm, 19 Wis. 111; Hopkins *v.* Nichols, 22 Tex. 206; Societé Fonciere et Agricole des Etats Unis *v.* Milliken, 10 S. Ct. 823, 135 U. S. 304; Muller *v.* Leeds, 52 N. J. Law 366, 19 Atl. Rep. 261; Sandheger *v.* Hosey, 26 W.Va. 221; Dawley *v.* Sherwin, (S. Dak.) 59 N. W. Rep. 1027.

4. Penniman *v.* Daniel, 90 N. C. 154; Sandheger *v.* Hosey, 26 W. Va. 221; Kuhn *v.* Embry, 35 La. Ann. 488; Stokes *v.* Potter, 10 R. I. 576; Garson *v.* Brumberg, 75 Hun 336, 26 N. Y. S. 1003; Dintruff *v.* Tuthill, 62 Hun 591, 17 N. Y. S. 556.

5. McCraw *v.* Welch, 2 Col. T. 284. Likewise a statement that the defendant fraudulently contracted the debt, "or" incurred the obligation, will not be considered to be void for uncertainty, because the *obligation* and the *debt* are necessarily the same. Emerson *v.* Detroit Steel and Spring Co., 100 Mich. 127, 58 N. W. Rep. 659; Emerson *v.* Spearman, 100 Mich. 127, 58 N. W. Rep. 659.

6. Commercial Bank *v.* Ullman, 10 Smedes & M. (Miss.) 411.

7. Blum *v.* Davis, 56 Tex. 423; Cleveland *v.* Boden, 63 Tex. 103.

8. Cannon *v.* Logan, 5 Porter (Ala.) 77; Hardy *v.* Trabue, 4 Bush (Ky.) 644; Goss *v.* Gowing, 5 Rich. (Law) (S. C.) 477.

9. Van Alstyne *v.* Erwine, 11 N. Y. (1 Kern.) 331; Irvin *v.* Howard, 37

in the affidavit that the plaintiff has good reason to believe that the defendant has done, *or* is about to do, the act complained of, will not invalidate the affidavit when the statute allows an attachment for either cause.[1]

§ 147. **Of absconding and concealed debtors.**[2]—In stating the ground for attachment in the affidavit it is not generally necessary that the affiant should adopt the precise language of the statute; it will be sufficient if it comply substantially with the requirements.[3] If the statute requires anything further in the affidavit than an averment that the debtor is absconding or is concealed, the requirements must be fully complied with: As for example, under a statute requiring an additional averment that the debtor is not a resident of the state at the time, an affidavit stating that "the debtor absconds from his creditors and is not, at this time, within the state, nor within the reach of the process of the state," will not support an attachment.[4] Nor, under the same statute, is an affidavit stating that the defendant "absents" himself from his creditors, sufficient.[5] The word "abscond" in its legal sense means more than that the debtor "absents" himself. It means that such absenting, hiding, or concealing of himself be done *with intent* to avoid legal process. An averment that the debtor is about to abscond is not sufficient.[6]

The allegation under the attachment act must be in the present

Ga. 18; Chamberlain *v.* Hutchins, 1 Dak. Ter. 506.

But see Davis *v.* Edwards, Hardin (Ky.) 342; Shipp *v.* Davis, Hardin (Ky.) 65; Jewel *v.* Howe, 3 Watts. (Pa.) 144.

1. Howard *v.* Oppenheimer, 25 Md. 350; Dean *v.* Oppenheimer, 25 Md. 368; Hardy *v.* Trabue, 4 Bush (Ky.) 644; Irvin *v.* Howard, 37 Ga. 18.

2. To ascertain who is considered an absconding debtor, see *ante*, § 88.

3. Wallis *v.* Wallace, 7 Miss. (6 How.) 254.

4. Croxall *v.* Hutchings, 12 N. J. L. (7 Hals.) 84.

5. Conard *v.* Conard, 17 N. J. L. (2 Harr.) 154.

6. Bennett *v.* Avant, 2 Sneed (Tenn.) 152.

An affidavit stating that the defendant is in another state, and is about to sell or remove his property, does not sufficiently aver an absconding to authorize an attachment under Iowa code. State *v.* Morris, 50 Iowa 203.

An averment that A and B (that being the firm name as well as the names of the individuals), conceal themselves, sufficiently alleges that the individuals conceal themselves. Guckenheimer *v.* Day, 74 Ga. 1.

tense.[1] An allegation referring indefinitely to the past, making no allusion to the present or future, is too vague to form a legal foundation for attachment where the statute requires such condition to exist in the present.[2] Words of the statute must be used,[3] or at least the substantial meaning thereof.[4]

When the statute gives ground for attachment because the debtor "absconds" or "has departed" from the state "with intent to avoid service of process," or "with intent to defraud his creditors," such intent must be averred, or the affidavit will be fatally defective.[5] It is not enough that having departed with a lawful intent, he stays away with intent to defraud.[6]

If the provision of the statute is further, that the debtor "is about to depart the state with intent," etc., the averment must substantially comply therewith.[7] And an affidavit stating "that the defendant is going away out of the county with intent to defraud his creditors" is insufficient.[8]

When the ground for attachment is, that the debtor is absconding "so that the ordinary process of law can not be served upon him," such averment must also be made in the affidavit.[9] And if such averment be made without the averment that the debtor is "absconding," it will not be sufficient.[10]

1. Kennedy *v.* Dillon, 1 A. K. Marsh. (Ky.) 354; Hopkins *v.* Suttles, Hard. (Ky.) 95, note; Lewis *v.* Butler, Sneed (Ky.) 246; Mulherrin *v.* Hill, 5 Heisk. (Tenn.) 58; Brown *v.* McCluskey, 26 Ga. 577.

2. City of New Orleans *v.* Garland, 11 La. Ann. 438.

3. Levy *v.* Millman, 7 Ga. 167.

But though not being used may give grounds for error in a direct proceeding, it may not be a competent objection in a collateral proceeding. Boothe *v.* Estes, 16 Ark. 104.

4. See *supra*, § 145.

5. Love *v.* Young, 69 N. C. 65; Leak *v.* Moorman, (N. C.) Phill. L. 168; Thames and Mersey Marine Ins. Co. *v.* Dimmick, 22 N. Y. S. 1096, 66 Hun (N. Y.) 634; Crayne *v.* Wells, 2 Ill. App. 574; Frantz *v.* Wendel, 28 Ind. 391.

6. Hafern *v.* Davis, 10 Wis. 501.

7. Ware *v.* Todd, 1 Ala. 199.

8. Griffis *v.* Swick, (Pa. Com. Pl.) 12 Pa. Co. Ct. R. 389; Swick *v.* Griffis, (Pa. Com. Pl.) 2 Pa. Dist. 550.

9. Thompson *v.* Raymon, 8 Miss. (7 How.) 186; Hopkins *v.* Grissom, 26 Miss. 143; Poage *v.* Poage, 3 Dana (Ky.) 579; Davis *v.* Edwards, Hard. (Ky.) 342; Shipp *v.* Davis, Hard. (Ky.) 65.

10. M'Culloch *v.* Foster, (Tenn.) 4 Yerg. 162.

If the statute does not require this averment of the effect of the absconding it will be unnecessary to make such statement.[1] But if stated, it will be treated merely as surplusage, and will be no ground for quashing the attachment.[2]

When the words "absconds or secretes himself," etc., appear in the averment of cause for attachment, such alternative statement is not irregular, because it is not an averment of two distinct and inconsistent grounds.[3] One or more consistent grounds may, however, be averred in the same affidavit.[4] But the averment of two grounds alternatively, as "that the defendant is about to remove from and without the limits, *or* so absconds, conceals himself," etc., is not sufficient.[5]

The making of an affidavit on information and belief is seldom permitted, unless the same is expressly provided for by the statute.[6] The fact should be set forth by positive averment.[7] But an amendment in that regard is sometimes allowed.[8] A positive averment is not, however, vitiated by stating why the affiant believes that fact.[9] In states where the

1. Conklin *v.* Harris, 5 Ala. 213.

2. McMahan *v.* Boardman, 29 Tex. 170.

If the statutory ground for attachment is that the defendant is about to leave the state "forever," averring that he is about to leave the state permanently will be in substantial compliance therewith. Sawyer *v.* Arnold, 1 La. Ann. 315.

An affidavit stating as the ground for attachment that the defendant is about to leave the state, need not aver that the plaintiff is thereby liable to lose his debt, unless the statute particularly so requires. Wright *v.* Smith, 19 Tex. 297.

3. Cannon *v.* Logan, 5 Port. (Ala.) 77.

But the affidavit is not *per se* proof of permanent departure. Gordon *v.* Baillio, 13 La. Ann. 473.

4. Swezey *v.* Bartlett, 3 Abb. (N. Y.) Pr. N. S. 444; Kennon *v.* Evans, 36 Ga. 89.

Where the statutory ground is that the debtor "absconds or conceals himself *or* his effects" an affidavit that he "is concealing his property *and* effects," will support attachment. Boyd *v.* Buckingham, 10 Humph. (Tenn.) 434.

5. Hagood *v.* Hunter, 1 McCord (S. C.) 511. See further as to "Alternative Statement," *ante*, § 146.

6. Stewart *v.* Katz, 30 Md. 334; Greene *v.* Gonzales, 2 Daly (N. Y.) 412; Guile *v.* McNanny, 14 Minn. 520; Gashine *v.* Baer, 64 N. C. 108; Wilson *v.* Barnhill, 64 N. C. 121; Bank of Alabama *v.* Berry, 2 Humph. (Tenn.) 443; Wallis *v.* Wallace, 7 Miss. (6 How.) 254; Walker *v.* Anderson, 18 N. J. L. (3 Harr.) 217.

7. Archer *v.* Claflin, 31 Ill. 306.

8. Sannoner *v.* Jacobson, 14 S. W. Rep. 458, 47 Ark. 31; Webster *v.* Daniel, 47 Ark. 131.

9. Spear *v.* King, 6 Smedes & M. (Miss.) 276.

officer granting the writ acts in a judicial capacity as above mentioned,[1] the applicant's affidavit must state the ground for it, and he must prove facts and circumstances to sustain such grounds by his own affidavit, or that of another or others.[2] In such states an affidavit on "belief," without setting forth the facts, will not lay a foundation for attachment.[3] An affidavit based upon the return of an officer is not on information and belief, the reference to the return being made as evidence.[4]

When the statutory ground for attachment, because of the defendant absconding or concealing himself, etc., is not sufficiently averred to give the court jurisdiction, such defect in the affidavit may be taken advantage of by motion to dismiss, or motion to dissolve the attachment.[5]

§ 148. Of non-residence of defendant.[6]—Rules relating to

1. See *ante*, § 144.

2. Stewart *v.* Brown, 16 Barb. (N. Y.) 367; Towsley *v.* McDonald, 32 Barb. (N. Y.) 604; Kissock *v.* Grant, 34 Barb. (N. Y.) 144; *Ex parte* Robinson, 21 Wend. (N. Y.) 672; *Re* Faulkner, 4 Hill (N. Y.) 598; Matter of Bliss, 7 Hill (N. Y.) 187; Curwensville Mfg. Co. *v.* Bloom, (Pa. Com. Pl.), 10 Pa. Co. Ct. Rep. 295.

3. Dunlevy *v.* Schwartz, 17 Ohio St. 640.

4. Webster *v.* Daniel, 14 S. W. Rep. 550, 47 Ark. 131.

An affidavit made by a sheriff in which he states that he has made diligent efforts to serve a summons and complaint on the named defendant at the place "where she has resided for years," but that he could not because she had departed from the state to avoid such service, and that her son's bookkeeper told affiant that she had left the state, and that her daughter told affiant that she had gone to avoid the service of the process, is good though it does not give the reasons why the persons giving the information did not themselves make affidavit. National Bank of Commerce *v.* Whiteman Pulp and Paper Co., 21 N. Y. S. 748, 67 Hun (N. Y.) 648.

But an affidavit which shows that the affiant had called at the residence of the defendant and tried to secure an interview with him, which was refused under the asserted authority of the defendant, does not sufficiently show that the defendant kept himself concealed to avoid the service of a summons. Wallach *v.* Sippilli, 65 How. (N. Y.) Pr. 501.

Nor is an affidavit that "affiant and her friends have been informed that the defendant has left the state so that a summons can not be served upon him personally," sufficient under a statute requiring the affiant to state "the material facts relied on." Hudkins *v.* Haskins, 22 W. Va. 645.

5. Webb *v.* Bowler, 5 Jones (N. C.) L. 362. See further as to "Dissolution of Attachment," *post*, § 326.

6. An affidavit which attests the truth of the allegations of the petition will be sufficient, where the suit has been theretofore begun by a petition

foreign attachment and for the determination of who is and who is not a non-resident debtor have been hereinbefore considered,[1] leaving us to consider, in this place, only the averment in the affidavit of the fact of the non-residence of the debtor.

In seeking a foreign attachment, and, as a jurisdictional foundation therefor, the affiant must aver the present non-residence of the defendant with certainty.[2] But, while it is best always to do so, the affiant is not required to state in positive terms that the debtor is not a resident of the state. It is sufficient, when that conclusion is the only one which can be consistently drawn from the facts set forth in the affidavit.[3] An averment that the debtor "is a non-resident" is sufficiently certain.[4] And an affidavit averring that the defendant is "not an inhabitant of the state" is equivalent to one averring that he is a "non-resident" and sufficiently complies with the statute;[5] so does one that alleges that the affiant is "not a resident of the state."[6] And under a statute which provides for the issuance of an attachment when the defendant "resides out of the state," an affidavit averring that the defendant "is a non-resident," is a sufficient compliance.[7] There is a sufficient averment of the jurisdictional fact of non-residence in an affidavit which states that "the defendants are not citizens of the state of Maryland and do not reside therein."[8] But there must be an averment that the debtor is not a "resident" of the state. An allegation that he is "not at this time within the state" is insufficient.[9] And an averment that he is a "non-resident" is

and the petition sets forth the non-residence of the defendant. Miller *v.* Chandler, 29 La. Ann. 88; Farley *v.* Farior, 6 La. Ann. 725.

1. See *ante*, § 90 *et seq.*

2. Baldwin *v.* Ferguson, 35 Ill. App. 393; Winkler *v.* Barthel, 6 Ill. App. 111; Phelps *v.* Young, 1 Ill. (Breese) 327.

In Illinois an affidavit for a writ of foreign attachment can not be made before a justice of the peace. Campbell *v.* Whetstone, 4 Ill. (3 Scam.) 361.

3. Mayor, etc., of New York *v.* Genet, 4 Hun (N. Y.) 487.

4. Graham *v.* Ruff, 8 Ala. 171.

5. Wiltse *v.* Stearns, 13 Iowa 282.

6. Nagel *v.* Loomis, 33 Neb. 499, 50 N. W. Rep. 441.

7. Graham *v.* Ruff, 8 Ala. 171; McKiernan *v.* Massingill, 14 Miss. (6 Sm. & M.) 375; James *v.* Dowell, 15 Miss. (7 Sm. & M.) 333.

8. Franklin *v.* Claflin, 49 Md. 24.

9. Croxall *v.* Hutchings, 7 Hals. (N. J.) 84; Birchall *v.* Griggs, (N. Dak.) 60 N. W. Rep. 842.

sufficient without alleging that the defendant is *absent* from the state.[1] But the non-residence must be expressly averred.[2] An affidavit alleging that the debtor "is not a resident of the state so that the process of this court can not be served upon him," is ambiguous and insufficient.[3] But an affidavit stating "that defendant resides out of the state, having acquired no legal residence in the state" is good.[4] An affidavit, executed in Indiana, stating that the defendant "is not a resident of this state" which affidavit is entitled, in an action begun in Missouri and sworn to on the same day that the plaintiff executes an attachment bond stating that he is about to begin an attachment suit in Missouri, will be construed to be a sufficient statement that the defendant was not a resident of Missouri when the same is collaterally attacked.[5]

An affidavit of non-residence, made on information and belief, is in itself insufficient.[6] But when the officer allowing the writ to issue acts in a judicial capacity, the affiant may further aver the facts and circumstances; and if they are sufficient to establish, in the mind of the officer, the fact of the non-residence of the debtor, the affidavit will be sufficient.[7]

1. Clark *v.* Arnold, 9 Dana (Ky.) 305.

2. Powers *v.* Hurst, 3 Blackf. (Ind.) 229.

3. Lane *v.* Fellows, 1 Mo. 251.

4. Farley *v.* Farior, 6 La. Ann. 725.

5. Avery *v.* Good, 114 Mo. 290, 21 S. W. Rep. 815.

In Missouri an affidavit of non-residence may be made on information and belief by force of a section of the statute providing that an attachment may issue when the affiant shall state that he "has good reason to believe, and does believe, in the existence of one of the grounds." Tufts *v.* Volkening, 122 Mo. 631, 27 S. W. Rep. 522, s. c. 51 Mo. App. 7.

6. Deupree *v.* Eisenach, 9 Ga. 598; Neal *v.* Gordon, 60 Ga. 112; but see Mitchell *v.* Pitts, 61 Ala. 219; Steel *v.* Raphael, (N. Y.) 13 N. Y. S. 664; Everitt *v.* Park, (N. Y.) 34 N. Y. S. 827.

7. And the following may be taken as a suggestion of what may be done in this regard:

An attachment was sought on the ground of non-residence. An affidavit of the plaintiff was filed alleging that he was informed and believed that all of the defendants except J were non-residents of the state, and averring the place of residence of some of them, and that the whereabouts of the others was unknown and could not be learned after due diligence of the plaintiff, and further that affiant's information was gotten from affidavits on file in a partition suit which had been previously begun against the defendant. An affidavit of the plaintiff's attorney was filed alleging that the defendant J resided in New York city and that affiant was not personally acquainted with any of the other defendants, but that he had

An affidavit of the plaintiff to obtain an attachment on the ground of non-residence of defendant, stating that his information as to such non-residence is derived from defendant's book-keeper, will be sufficient without a statement that his informant's deposition can not be obtained.[1] But an affidavit which is positive as to the non-residence is sufficient in that respect, although defendant's place of residence outside the state is stated on information and belief, and the sources of information and grounds of belief be not given.[2] However, in Illinois, an affidavit which fails to state the defendant's place of residence, or a reason why it can not be given, is defective.[3]

Where something more than the mere fact of the non-residence of the debtor is required by the statute to be shown before the issuance of an attachment can be obtained, such further requirement must be complied with, or the affidavit will be fatally defective. If the statute require an averment that the defendant resides "out of the state," so that the ordinary process of law can not be served on him, the affidavit will be insufficient if it does not contain such allegation.[4] And when the statute allows a foreign attachment only on a contract made in the state, or to a creditor residing within it, that fact must be shown by the affidavit.[5] But where the statute

corresponded with them and was satisfied from such correspondence that they were all residents of Michigan or of the Dominion of Canada; that he had placed the summons in the hands of the sheriff of the county in which the action was brought, but that after due and diligent efforts service could not be made in that county or in that state, as made to appear by the sheriff's certificate annexed. The sheriff's certificate stated that the defendants could not be found in the county, and so far as he, the sheriff, could learn they were not residents of the state. The two affidavits and certificate taken together were held to be sufficient to procure an attachment on the ground of non-residence. Adams *v.* Hilliard, 14 N. Y. S. 120, 59 Hun (N. Y.) 626.

1. Scott *v.* Beaudet, 16 N. Y. S. 409, 62 Hun (N. Y.) 50.

2. Steel *v.* Raphael, 13 N. Y. S. 664, 59 Hun (N. Y.) 626.

3. Prins *v.* Hinchliff, 17 Ill. App. 153.

4. Wilson *v.* Outlaw, (Ala.) Minor 367; Chambers *v.* Sloan, 19 Ga. 84; Poage *v.* Poage, 3 Dana (Ky.) 579; Thompson *v.* Chambers, 12 Smedes & M. (Miss.) 488.

5. People *v.* Griffiths, Hill & D. (N. Y.) Supp. 447.

does not require an averment that the defendant has property in the state subject to attachment, such fact need not be stated.[1]

It is not necessary that it should be stated by affidavit that the plaintiff resides in the state,[2] nor is it necessary that such be the fact. However, where one non-resident seeks an attachment of the property of another non-resident, the affidavit should state that the defendant has not sufficient property within the state of his residence within the knowledge and belief of the affiant.[3]

An affidavit for a foreign attachment against a partnership should aver the non-residence of the copartners, or of the firm. An affidavit stating that the defendant is a non-resident, but which fails to show that the claim is against the defendant and other partners unnamed, and does not state that the other partners are non-residents, is defective.[4] But the affidavit showing that some of the codefendants are insolvent, and that others are non-resident, will be sufficient to obtain an attachment against the latter.[5] An averment that C, J and W are partners, using the name of C, J & Co., and that C, J & Co. reside out of the state is a sufficient statement of non-residence as ground for attachment.[6]

It is important for the practitioner to remember that the averment in the affidavit, respecting the residence of the debtor, is not conclusive. The *fact* may be inquired into, and if the court be satisfied, from the evidence, that the defendant

1. Kenney *v.* Goergen, (Minn.) 31 N. W. Rep. 210, 36 Minn. 190, followed. Bigelow *v.* Chatterton, 51 Fed. Rep. 614, 2 Cir. Ct. App. 402, 10 U. S. App. 267.

2. Peters *v.* Bower, Minor (Ala.) 69.

3. Cobb *v.* Miller, 9 Ala. 499; Cobb *v.* Force, 6 Ala. 468; Wright *v.* Ragland, 18 Tex. 289.

If the statute requires the affidavit to state that the attachment is not sued out to injure or harass the defendant, such averment must also be included. Wright *v.* Ragland, 18 Tex. 289.

4. Corbit *v.* Corbit, 50 N. J. L. 363, 13 Atl. Rep. 178.

5. Smith *v.* Coopers, 9 Iowa 376.

The Maryland code relating to amendments, misjoinder, and nonjoinder does not authorize the court to strike out the name of one of the defendants in the plaintiff's affidavit, or in the warrant in proceedings by attachment against non-resident debtors. Halley *v.* Jackson, 48 Md. 254.

6. Chambers *v.* Sloan, 19 Ga. 84. See further as to "Attachment against Copartnerships," *ante*, § 47.

did not reside out of the state at the time the proceedings were instituted, the attachment will be set aside, notwithstanding the plaintiff may have acted in good faith in making the affidavit.[1] A judgment rendered on an affidavit not warranted by the statute, relating to non-residents, may be set aside, even after the lapse of several years.[2]

§ 149. **Of removal of property or self.**—The primary object of the statute in making the act of the removal by the debtor of himself or his property a ground for attachment is to prevent injury to the creditor, and the removal becomes a ground for attachment only when it is made for that purpose. Consequently the "intent" of the debtor to "hinder and delay his creditors" (or whatever the purpose may be which the statute specifies), is the very foundation of the matter, and when the purpose of the removal is a condition named in the statute, it must always be averred.[3] In Tennessee it is said that the attachment statute will be liberally construed with a view to carry into effect the obvious intent of the legislature. Consequently the averment that the debtor was "about to remove a steamboat," was held to be equivalent to a statement that he was about to remove himself so that ordinary process of law could not be served upon him.[4] And again the averment that the debtor was "about to remove privately," omitting the words "so that the ordinary process of law can not be served upon him," was held to be sufficient; the word "privately" implying what the omitted clause would have expressed.[5] In Arkansas the averment that the debtor "has removed part, and is about to remove the remainder of his goods," has been held to be sufficient.[6] An allegation that the defendant "is actually removing the property of said estate without the limits of said

1. Brundred *v.* Del Hoy, 20 N. J. L. (1 Spen.) 328.

2. Alexander *v.* Haden, 2 Mo. 228. See further as to "Dissolution of Attachment," *post*, § 326.

3. Keith *v.* McDonald, 31 Ill. App. 17; Crayne *v.* Wells, 2 Ill. App. 574; Vandevoort *v.* Fanning, 10 Iowa 589; Torbert *v.* Tracy, 12 Iowa 20; Branch of State Bank *v.* White, 12 Iowa 141.

4. Runyan *v.* Morgan, 7 Humph. (26 Tenn.) 210.

5. Bank of Alabama *v.* Berry, 2 Hump. (21 Tenn.) 443. See McCulloch *v.* Foster, 4 Yerg. (12 Tenn.) 162.

6. Mandel *v.* Peet, 18 Ark. 236.

county," is a sufficient compliance with the requirements of the Georgia code.[1] In Mississippi it has been said that in an affidavit stating that the debtors "are about removing from the state, or are so concealing their effects as to defeat the creditor's claim," the word *removing* refers to the effects and sufficiently complies with the statute.[2] It is there further held that the words "will remove" are equivalent to the words of the statute "about to remove."[3] But an affidavit which avers that the debtor "intends to remove" does not give ground for attachment under a statute permitting it when the debtor is removing.[4] Nor will the confused statement of two grounds for attachment averred as one ground be sufficient,[5] though two compatible grounds may be averred in the same affidavit.[6] Neither will the disjunctive averment that the debtor "is removing or about to remove" his property, state a ground for attachment. There must be a precise statement of one of the grounds which give jurisdiction.[7] And it must be a *positive* statement. An averment that the "deponent verily believes said defendant has left the state to reside permanently out of it" will not be sufficient.[8] Furthermore, averments that the defendant has removed *some* of his property from the jurisdiction of the court will be sufficient.[9]

Where the officer allowing the writ of attachment to be taken

1. Cox *v.* Felder, 36 Ga. 597.

And see further as to an averment of two grounds. Kennon *v.* Evans, 36 Ga. 89.

2. Commercial Bank *v.* Ullman, 18 Miss. 411.

3. Dandridge *v.* Stevens, 20 Miss. 723.

4. Mantz *v.* Hendley, 2 Hen. and Munf. (Va.) 308.

5. Wallis *v.* Murphy, 2 Stew. (Ala.) 15; Napper *v.* Noland, 9 Port. (Ala.) 218.

6. See *ante*, §§ 145 and 146.

7. Allen *v.* Fleming, 14 Rich. (Law) (S. C.) 196; Devall *v.* Taylor, Cheves (S. C.) 5.

8. Friedlander *v.* Myers, 2 La. Ann. 920.

An affidavit stating that plaintiff has reason to believe and fear that the "defendant will sell or dispose of said crop, or cause to be removed said slaves from the state during pendency of the suit" was held to be uncertain because of being in the alternative, and because the plaintiff did not swear to the ownership of the property. Ranaldson *v.* Hamilton, 5 La. Ann. 203; Hickman *v.* Flenniken, 12 La. Ann. 268.

9. Boulter *v.* Behrend, 20 D. C. (9 Mackey) 567; Robertson *v.* Behrend, 20 D. C. (9 Mackey) 567; Whittle *v.* Behrend, 20 D. C. (9 Mackey) 567; Thompson *v.* Behrend, 20 D. C. (9 Mackey) 567.

out acts in a judicial capacity to determine whether or not the ground for attachment exists, the affiant, on information and belief, must swear to the facts inducing his apprehension of the removal.[1] But an attachment will not be dismissed on motion at the instance of a subsequent lienholder, because the affidavits on which it was granted are defective in that they do not allege sufficient facts to raise an overwhelming suspicion of fraud, by alleging merely that the defendant has departed, and has removed property from the state with intent to defraud his creditors, though subsequent events demonstrate the truth of the allegations.[2] Yet it is said that if the judge acts upon such an affidavit it will be good.[3]

In many states, however, an affidavit as to removal made on information and belief is sufficient,[4] when it avers the debtor's injurious "intent" as required by the statute.[5] And if the statute requires an averment that the affiant "has reason to believe and does believe" that the debtor is about to remove his property, an affidavit which states only that the affiant "believes" that the debtor is about to do so will be fatally defective.[6] When a person swears that he "has reason to believe and does verily believe" a thing to be true, it is equivalent to swearing that it is true.[7]

Only those defendants who are brought within the provisions of the attachment act by the affidavit as to their "intent to remove," etc., can be proceeded against.[8]

As above stated, the mere fact that a debtor is about to remove his property from the state will not justify an attachment. The conditions must be such that the removal, if

1. Fulton *v.* Heaton, 1 Barb. (N.Y.) 552.
2. Deimel *v.* Scheveland, 9 N.Y.S. 482.
3. Harrison *v.* King, 9 Ohio State 388; Coston *v.* Paige, 9 Ohio State 397; Bres *v.* Booth, 1 La. Ann. 307; Souberain *v.* Renaux, 6 La. Ann. 201; Reding *v.* Ridge, 14 La. Ann. 36. See Wells *v.* St. Dizier, 9 La. Ann. 119; Kleinwort *v.* Klingender, 14 La. Ann. 96.
4. Ginnis *v.* Bacon, Dudley (Ga.) 195; Lester *v.* Cummings, 8 Humph. (Tenn.) 385: Sydnor *v.* Totman, 6 Tex. 189.
5. Boarman *v.* Patterson, 1 Gill (Md.) 372.
6. Hunt *v.* Strew, 39 Mich. 368; Simpkins *v.* Malatt, 9 Ind. 543.
7. Simpkins *v.* Malatt, 9 Ind. 543.
8. Lawrence *v.* Steadman, 49 Ill. 270.

effected, will be "to the injury of" the creditor,[1] (or with the debtor's intent so to do, when such is the requirement of the statute). Hence, it will be proper to traverse the allegations in the affidavit by plea in abatement, and, under this issue, to prove that sufficient unencumbered property remains in the state to discharge the plaintiff's demand.[2]

§ 150. **That debtor is "about to conceal, assign, or dispose of his property," etc.**[3]—In this, as in the other ground for attachment, the essential fact necessary is not that the debtor is about to convert his property into money, for there is no wrong in that, but that he will do so with intent to place it beyond the reach of his creditors.[4]

1. White *v.* Wilson, 10 Ill. (5 Gilm.) 21; White *v.* Williams, 10 Ill. (5 Gilm.) 25. And as to "Effect of Honest Purpose," see *ante*, § 107.

2. White *v.* Wilson, 10 Ill. (5 Gilm.) 21; White *v.* Williams, 10 Ill. (5 Gilm.) 25. See as to "Dissolution of Attachment," *post*, § 326.

It does not come within the scope of this work to treat of the enforcement of a landlord's lien upon the crops of his tenant by attachment; but it may not be amiss to state that it must be averred that the parties are landlord and tenant and that the indebtedness is for rent or advances. Staggers *v.* Washington, 56 Ala. 225. And that the removal of the crops from the rented premises is without the landlord's consent. Shield *v.* Dothard, 59 Ala. 595. Both of these facts are jurisdictional and the proceedings will be void unless the affidavit contain such averment. The omission of either can not be supplied by amendment. Shield *v.* Dothard, 59 Ala. 595. As to attachment of tenant's goods when he is about to remove them, the ordinary rules relating to debtors and creditors will apply, and further observe, Wright *v.* Hobson, 4 Harr. (Del.) 382.

3. For the *general principles* regarding fraudulent disposal, secretion, or conveyance of property, see *ante*, § 112, *et seq.*; we will treat here only of the averment in the affidavit.

4. Frere *v.* Perret, 25 La. Ann. 500.

The Florida statute, which provides that an attachment may issue when the debtor is fraudulently disposing of his property to avoid the payment of his just "debts and demands," requires an affidavit to that effect, but does not make it necessary that the affidavit state that the disposition is to avoid the payment of debts "due to the plaintiff." Tanner & D. E. Co. *v.* Hall, 22 Fla. 391.

In Alabama an averment that defendants are about to dispose of their "goods," etc., is equivalent to an affidavit that they are about to dispose of their "property." Hafley *v.* Patterson, 47 Ala. 271.

An attachment was issued upon an affidavit reciting that the defendant had assigned, etc., with an intent to give an unfair preference to some of his creditors. The writ reciting the

The difference in averment required by statutes which do or do not require the officer, granting the writ, to act in a judicial capacity as hereinbefore noted, is equally applicable in this connection.[1] In states where he acts in a ministerial capacity only, the affidavit is generally sufficient when it avers the grounds in the language of the statute, without setting out in detail the circumstances constituting or proving the ground averred.[2] But the same precision in averring the "intent" must be observed by the affiant in this regard, as has already been pointed out to be necessary in other grounds for attachment.[3] And it should be a positive averment;[4] although it is sometimes permitted to be made on belief.[5] However, an averment that the affiant "has good reason to believe" that the debtor is "about to dispose of his property with intent to defraud his creditors," without stating any facts upon which such belief is founded, is not sufficient under a statute which provides that the officer shall issue an attachment "upon

affidavit used the word "them" instead of "creditors;" the court said that by looking at the whole record, the error became immaterial. McClanahan *v.* Brack, 46 Miss. 246.

1. See *ante*, § 144.

2. Ellison *v.* Tallon, 2 Neb. 14; Hockspringer *v.* Ballenburg, 16 Ohio 304; Lovelady *v.* Harkins, 14 Miss. 412; Hall *v.* Kintz, (Pa. Com. Pl.) 13 Pa. Co. Ct. R. 24; Hall *v.* Kintz, (Pa. Com. Pl.) 2 Pa. Dist. R. 615; Richards *v.* Donaughey, 13 Phila. (Pa.) 514.

3. See *ante*, § 147; Free *v.* Hukill, 44 Ala. 197; Cooper *v.* Reeves, 13 Ind. 53; Auerbach *v.* Hitchcock, 28 Minn. 73; Zeigler *v.* Cox, 63 Ill. 48; Sheffield *v.* Gay, 32 Tex. 225; Bowen *v.* Gilkison, 7 Iowa 503; Pittman *v.* Searcey, 8 Iowa 352; Drake *v.* Hager, 10 Iowa 556.

As to averment under the Iowa code that the defendant is about to dispose of his property without leaving sufficient for the payment of the plaintiff's claim, is sufficient, because an intention to defraud need not be there shown. See Sherrill *v.* Fay, 14 Iowa 292; Mingus *v.* McLeod, 25 Iowa 452.

4. Stadler *v.* Parmlee, 10 Iowa 23; Enneking *v.* Clay, 79 Ga. 598, 7 S. E. Rep. 257.

5. First Nat. Bank *v.* Swan, 3 Wy. 356, 23 Pac. Rep. 743; Curtis *v.* Settle, 7 Mo. 452.

An attachment granted upon an affidavit stating as a ground that the defendant was about to convey "or" assign, to hinder "or" delay his creditors, was supported by a verdict that he was about to convey "and" assign, to hinder "and" delay. Stewart *v.* Cabanne, 16 Mo. App. 517.

An averment that the defendant has assigned or is about to assign, etc., "any" of his property is not sufficient. Miller *v.* Munson, 34 Wis. 579.

proof" by affidavit of that fact.[1] But a positive averment that "defendant is about to dispose of his personal property and depart from the county with intent to defraud his creditors," is sufficient to give jurisdiction under such statute.[2]

When the affidavit is alone sufficient without the officer acting judicially to determine whether or not the facts averred establish a ground for attachment, an averment in the general language of the statute is sufficient in the first instance. If the charge thus made be denied by plea, or a question of the sufficiency is raised by motion to dissolve the attachment, the burden is then upon the plaintiff to satisfy the court that the charge is well founded.[3]

But even in these states, the late statutes permitting an attachment before the debt is due require the affidavit to show the reasons for the immediate issuance of the writ; and the right to an attachment in such cases depends alone upon the fraudulent *intent* of the debtor to defraud, hinder, or delay the creditor, and the court is permitted to use its discretion to allow or disallow the writ. If by the abuse of that discretion a party is clearly injured, the decision may be reviewed on error; but to invoke the reviewing power of the appellate court, the record must contain such facts and circumstances as will fairly indicate the intent of the debtor. And if such intent is not then established by the affidavit, the attachment will not

1. Gates *v.* Bloom, 149 Pa. St. 107, 24 Atl. Rep. 184, 30 W. N. C. 127.

2. Spencer *v.* Bloom, 149 Pa. St. 106, 24 Atl. Rep. 185; Moore *v.* Bloom, 149 Pa. St. 109, 24 Atl. Rep. 185.

And such positive affidavit is sufficient in South Carolina. Roddey *v.* Erwin, 9 S. E. Rep. 729, 31 S. C. 36.

But one on information and belief is not. Kerchner *v.* McCormac, 25 S. C. 461.

The *intent* was sufficiently averred by a statement that the debtor conveyed his property to a third person, with the understanding that it should be re-conveyed to the debtor after the third person's claim had been satisfied, and that this conveyance was made by the debtor to avoid the payment of his debts. When such fact was verified by the affidavit of the debtor, in which affidavit he admitted that the facts stated by the creditor were substantially true, except that the conveyance was not made to defraud his creditors. Gray *v.* Neill, 86 Ga. 188, 12 S. E. Rep. 362; Coleman *v.* Neill, 86 Ga. 188, 12 S. E. Rep. 362

3. Hall *v.* Kintz, (Pa. Com. Pl.) 13 Pa. Co. Ct. Rep. 24, s. c. 2 Pa. Dis. Rep. 615; Ellison *v.* Tallon, 2 Neb. 14.

be sustained.[1] A statement of facts and circumstances, to be sufficient in these cases, must be equivalent to the statement required in other cases where the facts and circumstances are required to be stated in the first instance.[2]

Where the officer permitting the writ of attachment to issue acts in a judicial capacity, in the issuance of an attachment on the ground that the defendant has disposed or is about to dispose of his property with intent to defraud his creditors, there must be evidence of that fact produced to the officer.[3] An affidavit in such a case will be sufficient, if it contains allegations of facts which require the officer to exercise his judgment in the matter, and which though not conclusive, yet tend legally to establish the fraud.[4] It is not necessary that the facts stated in the affidavit should be decisive of a design on the part of the debtor to dispose of his property with intent to defraud his creditors. It is sufficient that they tend to sustain that averment.[5] Where the averment, that the debtor is about to fraudulently dispose of his property with intent to defraud his creditors, is made on information and belief, the sources of the information must be disclosed.[6] And if such source be

1. Pierce *v.* Johnson, 93 Mich. 125, 53 N. W. Rep. 16; Ripon Knitting Works *v.* Johnson, 93 Mich. 129, 53 N. W. Rep. 17; Mack *v.* Johnson, 93 Mich. 129, 53 N. W. Rep. 17; Leonard *v.* Johnson, 93 Mich. 129, 53 N.W. Rep. 17; Seidentopf *v.* Annabil, 6 Neb. 524.

2. What showing is sufficient in this respect, see Capehart *v.* Dowery, 10 W. Va. 130.

3. Mechanics' and Traders' Bank *v.* Loucheim, 8 N. Y. S. 520, 55 Hun (N. Y.) 396.

But in Pennsylvania where an affidavit is in the words of the statute, the attachment will not be dismissed because it fails to set out the specific fraud on which the action is founded, but plaintiff will be allowed to take depositions for the purpose of explaining any uncertain expression in the affidavit. Harris *v.* Wood, (Pa. Com. Pl.) 1 Pa. Dist. R. 83.

4. Talcott *v.* Rosenberg, 3 Daly (N. Y.) 203, 8 Abb. (N. Y.) Pr. N. S. 287.

5. Cooney *v.* Whitfield, 41 How. (N. Y.) Pr. 6; Blakeslee *v.* Cattelain, 86 Hun 574, 33 N. Y. S. 903.

6. Nelson *v.* Fuld, 89 Tenn. 466, 14 S. W. Rep. 1079; McHaney *v.* Cawthorn, 60 Tenn. (4 Heisk.) 508; Jackson *v.* Burk, 60 Tenn. (4 Heisk.) 610; Brown *v.* Crenshaw, 5 Baxter (Tenn.) 584; Claussen *v.* Fultz, 13 S. C. 476; Ivy *v.* Caston, 21 S. C. 583; Thomas *v.* Dickinson, 11 N. Y. S. 436, 58 Hun (N. Y.) 603.

An affidavit for an attachment, on the ground that the debtor is about to dispose of his property, with intent to defraud his creditors, in which all the material facts are averred on information and belief only, without showing

mere heresay, it will not then be sufficient. Averments in plaintiff's affidavit of statements made to him by a brother of defendant, and matters ascertained by the plaintiff from a named person and from other sources, are allegations of mere heresay.[1]

It is a sufficient averment of the fact "that defendant was about to assign, dispose of, or secrete his property with intent to defraud his creditors," to aver "that said property was secretly removed out of its usual place at night and found several miles distant and that when it was overtaken, the persons having possession thereof made conflicting statements as to whose property it was."[2] So is an averment sufficient, that the defendant had said she could not pay; had disposed of her property and was about to depart from the state to reside in Canada; and that she was about to secrete or dispose of her property for the purpose of defrauding the plaintiff.[3]

Several affidavits may be made and filed together in order to constitute sufficient averment of facts. The following instance is given as an example of what may be done: One affidavit was made by one of the plaintiffs, that being informed that the defendant was disposing of his property with the intention of going to another state, affiant asked defendant about it and received "evasive answers," defendant stating that he "did not know what he was going to do," etc.; that there was an agreement to meet defendant's brother-in-law to settle the claim of the plaintiff; that the brother-in-law failed to keep the agreement; and that affiant was informed and believed that he left for another state before the time set for the meeting; that the defendant, after being arrested, broke his arrest and was re-

whether the informant was absent or his deposition not procurable, is said to be insufficient to give jurisdiction. Steuben County Bank *v.* Alberger, 78 N. Y. 252.

An affidavit averring fraudulent statements by the agent who attached the debtor's signature thereto, and which statements are not attached to the affidavit, nor the substance of them set out, will not be sufficient, because the creditor will not be allowed to determine for himself whether the statement will authorize an attachment. Fisher *v.* Secrist, (Cir. Ct.) 48 Fed. Rep. 264.

1. Farley *v.* Shoemaker, 1 N. Y. S. 729.

2. Brown *v.* Hawkins, 65 N. C. 645.

3. Van Loon *v.* Lyons, 61 N. Y. 22.

captured; that he had disposed of one hundred and forty acres of land which he had owned, etc. The second affidavit was made by a third person stating that defendant told affiant that he had sold his property and intended to leave the state with his brother-in-law. And the third, by another third person, stating that the defendant told affiant, on a train, that he was going on his way to another state, and asked affiant to tell certain of his creditors, not mentioning the plaintiff, to send their accounts to him and he would pay them.[1]

Insufficient statements of fact in affidavits, where the officer acts judicially, are numerous, and the following are selected as illustrating the faults to be avoided:

An affidavit alleging that defendant has sold some of his property in payment of a pre-existing debt at less than market value thereof is not sufficient; it should allege what the market value of the property was, or at what price it was applied in payment of the debt mentioned, or whether the difference between the market value and the price was substantial or only nominal.[2] An averment that defendants had obtained an extension of time on their debt by falsely stating to the plaintiff that they had taken an inventory of their property and were in a prosperous condition; and that about a month later they wrote that they had completed an inventory and found they were insolvent and wished to compromise with their creditors; that plaintiff then went to see the defendants and was told that if he sued on his claim they would make an assignment with preferences and plaintiff would get nothing, is not a sufficient showing that the debtors are about to dispose of their goods with intent to defraud.[3] Nor is an averment that defendants, who were engaged in manufacturing cloaks, obtained credit by representing that they were amply responsible; had a large surplus, and could soon pay their debts; that it was no part of defendant's business to sell cloth, but that they sold large quantities at less than cost prices; that they had very recently

1. Roddey *v.* Erwin, 31 S. C. 36, 9 S. E. Rep. 729.

2. Dintruff *v.* Tuthill, 17 N. Y. S. 556, 62 Hun (N. Y.) 591.

3. Atlas Furniture Co. *v.* Freeman, (Sup.) 23 N. Y. S. 1131.

received a large payment therefor, and, as the affiant believed, had appropriated it to their own use, with intent to prevent it from being applied to their debts. The affidavit should not state conclusions, but should state the facts necessary to justify conclusions.[1] Facts to justify a conclusion that this ground for attachment existed were not stated in an affidavit averring that the defendant said that he was perfectly solvent; that plaintiff was his largest creditor; and that all he owed besides amounted to $2,000; when, in fact, he had given his son his note for $6,400, on which he afterwards caused action to be brought and judgment to be entered by confession, and execution to be levied on all of his property, which was part of a scheme of defendant to dispose of his property with intent to defraud his creditors.[2]

An averment that the debtor is disposing of or secreting his property with intent to defraud his creditors is not supported by an allegation of fact, that the defendant, who is doing a large business, had sold goods cheaply, and in some cases below cost, and stating that in the impression of the community he was doing a reckless business.[3] Nor will an attachment be supported by a general allegation that "the defendant has assigned and disposed of his property with intent to defraud his creditors; that after purchasing the goods the defendant shipped about one-half of them to auction houses and sold them at auction."[4]

Where the facts stated in the affidavit, upon which the attachment is granted, are *prima facie* sufficient to show that the defendant has disposed of his property with intent to defraud his creditors, the attachment will not be disturbed, although there is no explanation of such facts.[5] But a *prima facie* cause

1. Kibbe *v.* Herman, 3 N. Y. S. 852, 51 Hun (N. Y.) 438; Geisenberger *v.* Herman, 3 N. Y. S. 855; Mitchell *v.* Herman, 3 N. Y. S. 855.

2. Stein *v.* Levy, 8 N. Y. S. 505, 55 Hun (N. Y.) 381.

3. Wando Phosphate Co. *v.* Rosenberg, 31 S. C. 301, 9 S. E. Rep. 969.

4. Achelis *v.* Kalman, 60 How. (N. Y.) Pr. 491.

5. First Nat. Bank *v.* Bushwick Chemical Works, 5 N. Y. S. 824, 17 Civil Proc. Rep. 229.

for attachment against a retail trader is not shown by averring that he was unable to pay the claim and to disclose his financial standing, that he had been selling for cash, retaining the proceeds, and was not replenishing his stock.[1] But under a statute which provides that the plaintiff in attachment "must show by affidavit to the (judge) that the defendant has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete his property, etc., with intent to defraud his creditors;" an affidavit which avers that a partnership has made an assignment for the benefit of creditors, by which an individual debt of one partner has been given preference over the firm debts, and that by reason thereof the firm has made a fraudulent assignment of its property, is sufficient to show a *prima facie* case.[2] No affidavit is sufficient which only states that the debtor did acts, of themselves not necessarily fraudulent, with intent to defraud his creditors.[3]

What has been hereinbefore said about making averments in the alternative is apt also in this connection.[4] An affidavit averring that the defendant "has removed or is about to remove his property from the state with intent to defraud creditors, * * * or has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete" his property with such intent, is insufficient because of being in the alternative.[5] And an affidavit stating that the defendant is about to "transfer or secrete" his property, is defective because of its indefiniteness.[6]

The principle hereinbefore stated regarding inconsistent grounds for attachment is also pertinent here.[7] And under a

1. Springfield *v.* Fields, 13 Daly (N. Y.) 171.

2. Citizens' Bank *v.* Williams, 12 N. Y. S. 678, 59 Hun (N. Y.) 617.

3. Delaplain *v.* Armstrong, 21 W. Va. 211; Landeman *v.* Wilson, 29 W. Va. 702, 2 S. E. Rep. 203.

An affidavit, stating as ground for attachment, that an assignment had been made with intent to hinder, delay and defraud creditors, and, as a statement of "material facts," set out the provisions of the assignment showing that the deed was fraudulent on its face. The affidavit was held to be supported by such "material facts." Landeman *v.* Wilson, 29 W. Va. 702, 2 S. E. Rep. 203.

4. See *ante*, § 146.

5. Dintruff *v.* Tuthill, 17 N. Y. S. 556, 62 Hun (N. Y.) 591.

6. Culbertson *v.* Cabeen, 29 Tex. 247.

7. See *ante*, §§ 142 and 145; Garner *v.* Burleson, 26 Tex. 348.

statute requiring a showing that the defendant "has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete" his property with intent to defraud creditors, the affidavit must either show that the property has been disposed of, or that the debtor is about to dispose of it, or else that he has disposed of part and is about to dispose of the other part. An affidavit that the defendant has disposed of and secreted, "and" is about to dispose of and secrete his property, is insufficient because the statements are inconsistent.[1] And an affidavit is defective in alleging that the defendant "is about to dispose of certain property not exempt from execution," and that "he has made a fraudulent sale thereof." Both statements can not be true of one item of property at the same time; and if the plaintiff can not swear to one state of facts or the other, it is quite conclusive evidence that he is not in possession of sufficient evidence to entitle him to the writ.[2] But averments that the debtor is about to dispose of his property fraudulently; that he has fraudulently disposed of a part of his property; and that he has money, property, and effects liable to satisfy his debts, which he fraudulently withholds, are consistent grounds for suing out the writ, and may be stated conjunctively in the affidavit.[3]

§ 151. **That debt was fraudulently contracted.**—It is noticeable that even in a state where it is sufficient for the affidavit to recite that "affiant has good reason to believe, and does believe," that the defendant has disposed of his property with "intent" to defraud his creditors, yet, where the ground is that the defendant fraudulently *contracted* the debt or incurred the obligation sued on, the above recital is not sufficient and the affidavit must allege the facts showing that the affiant has good reason to believe that the defendant fraudulently contracted the debt—that is, the facts constituting the fraud.[4]

1. Johnson *v.* Buckel, 20 N. Y. S. 566, 65 Hun (N. Y.) 601.
2. Hinds *v.* Fagebank, 9 Minn. 68.
3. Smith *v.* Baker, 80 Ala. 318.
4. First Nat. Bank *v.* Swan, 3 Wyo. 356, 23 Pac. Rep. 743.

Such we believe to be the general opinion of the courts in this regard.[1] Sufficient *facts* must be averred.[2]

Fraudulent intent, being a conclusion of law, should be made to appear, not by averment but from a statement of the facts warranting such a conclusion. Therefore, an affidavit setting forth acts of the debtor which are not in themselves necessarily fraudulent will not be sufficient, although a fraudulent intent be averred.[3] An attachment alleging that the defendant made certain representations to the plaintiff, he, relying thereon, sold and delivered goods, and that, two days after the plaintiff's claim became due, defendant assigned all his property without consideration, but which does not contain any allegation or proof that the transfer was fraudulent, does not state sufficient facts, although the affidavit alleges that the debt was fraudulently contracted.[4] But averments substantially that the defendant has declined to pay his debts, has put off the request with evasive answers, has sold his interest in a lease and fixtures, and is about to take his property to another state and reside there, has been held to be a sufficient statement of fact to sustain the charge of fraudulent intent.[5]

While an attachment should not be granted on an averment of insufficient facts and conclusions of the affiant, as stated above, yet when facts alleged have not been contradicted,[6] and the case has been determined, it will not be then disturbed, if there has been no abuse of official discretion. These principles have, however, been sufficiently stated hereinbefore.[7]

1. Under the Illinois attachment statute, which authorizes an attachment when the debt sued for has been fraudulently contracted, "provided the statements of the debtor, his agent or attorney, which constitute the fraud, shall be reduced to writing and his signature attached thereto by himself, agent or attorney," affidavits showing fraudulent statements in writing by the debtor's agents, to which the debtor's signature is not attached will not support the writ. Fisher *v.* Secrist, (Cir. Ct.) 48 Fed. Rep. 264.

2. Garner *v.* White, 23 Ohio St. 192.

3. Norfolk & N. B. H. Co. *v.* Arnold, 18 N. Y. S. 910; Delaplain *v.* Armstrong, 21 W. Va. 211; Hale *v.* Donahue, 25 W. Va. 414.

4. Grosvenor *v.* Sickle, 2 N. Y. S. 40; Vietor *v.* Kayton, 2 N. Y. S. 42.

5. Stevens *v.* Middleton, 26 Hun (N. Y.) 470.

6. See as to Waiver of Objection, *post*, § 221.

7. What is sufficient fraud to sustain such attachment, see *ante*, § 111.

What is sufficient *averment* of facts and circumstances to show a *prima facie* case of fraud, see the last section above.

§ 152. Amendment of the affidavit.—It has been shown that courts acquire a special and limited jurisdiction in attachment cases by force of the affidavit.[1] And without an affidavit to give the court jurisdiction, the proceedings will be utterly void. This rule is universal. Consequently where there is no affidavit, the proceedings should be quashed whenever such fact is brought to the knowledge of the court.[2] It is a general rule that proceedings on a void affidavit can not be amended.[3]

An affidavit can in no case be amended unless the statute of the state expressly authorizes it.[4] The statutes of many states do expressly authorize an amendment for irregularities and defects either of form or substance.[5] Some states will not permit an attachment writ to be quashed on account of insufficiency of the original affidavit, if a sufficient affidavit is filed.[6] And where the statute gives the plaintiff a right to file an amended affidavit in *lieu* of an insufficient one, it will be error for the court to refuse an amendment.[7] In such case the court has no discretion in the matter.[8] And under the Missouri statute,

1. See *ante*, § 127.

2. McReynolds *v.* Neal, 8 Humph. (Tenn.) 12.

3. Watt *v.* Carnes, 4 Heisk. (Tenn.) 532; Lillard *v.* Carler, 7 Heisk. (Tenn.) 604; Halley *v.* Jackson, 48 Md. 254; Brown *v.* McCluskey, 26 Ga. 577; Tanner & D. E. Co. *v.* Hall, 22 Fla. 391; Winters *v.* Pearson, 72 Cal. 553, 14 Pac. Rep. 304; Hall *v.* Brazelton, 40 Ala. 406, 46 Ala. 359; Slaughter *v.* Bevans, 1 Pinney (Wis.) 348; Whitney *v.* Brunette, 15 Wis. 61; Marx *v.* Abramson, 53 Tex. 264.

4. In West Virginia a defective affidavit can not be supplemented by a subsequent affidavit or proofs. United States Baking Co. *v.* Bachman, 18 S. E. Rep. 382, 38 W. Va. 84.

5. Rosenberg *v.* Claflin & Co., 95 Ala. 249, 10 So. Rep. 521; Richards *v.* Bestor, 90 Ala. 352, 8 So. Rep. 30; Langworthy *v.* Waters, 11 Iowa 432; Wadsworth *v.* Cheeney, 13 Iowa 576; Graves *v.* Cole, 1 G. Greene (Iowa) 405; Sheldon *v.* Kivett, 14 S. E. Rep. 970, 110 N. C. 408; Penniman *v.* Daniel, 93 N. C. 332; Josephi *v.* Mady Clothing Co., 13 Mont. 195, 33 Pac. Rep. 1; Dalsheimer *v.* McDaniel, 69 Miss. 339, 12 So. Rep. 338; Freer *v.* White, 91 Mich. 74, 51 N. W. Rep. 807.

Changing "has resided" to "has not resided" is not in Michigan authorized by such statute. Freer *v.* White, 91 Mich. 74, 51 N. W. Rep. 807.

6. Leppel *v.* Beck, 2 Colo. App. 390, 31 Pac. Rep. 185; Claflin *v.* Hoover, 20 Mo. App. 314; Bailey *v.* Valley Nat. Bank, 127 Ill. 332, 19 N. E. Rep. 695.

This amendment may include additional items of indebtedness. Chapman *v.* Stuckey, 22 Ill. App. 31.

7. Baker Wire Co. *v.* Kingman, 44 Kan. 270, 24 Pac. Rep. 476.

8. Norton *v.* Flake, 36 Mo. App. 698.

The Missouri statute permits the amended affidavit to embrace the

which provides that when an affidavit is *adjudged* insufficient, the plaintiff may amend, it is held that he need not wait till the affidavit is held defective, but may amend in advance.[1]

Amendments of *form*, and as to clerical errors, are oftener permitted than amendments as to the *substance* of the affidavit.[2] Clerical errors which can not mislead because of the context clearly showing what was intended will be immaterial and ineffective on a motion to quash.[3] But the same may be corrected by amendment if it be deemed necessary, and if by any possibility it may confuse and lead to a misunderstanding as to the person or thing intended to be named or mentioned, it should be corrected. A clerical error in the name of the defendant is amendable.[4] The variance between *Abraham* and *Abram*, in the Christian name of the plaintiff in the affidavit (and writ) in attachment may be amended.[5] The names of individual members of a firm may be added to the affidavit by amendment when the firm name alone has been averred therein.[6] And where there is no question of identity the style of the defendant's name may be changed. "The R—— Grocery Company, a corporation," was changed to "E. R——, a married woman, doing business under the name and style of the R—— Grocery Company."[7] The omission of the affiant

same or any other ground. Norton *v.* Flake, 36 Mo. App. 698.

1. Musgrove *v.* Mott, 90 Mo. 107, 2 S. W. Rep. 214.

2. Anderson *v.* Kanawha Coal Co., 12 W. Va. 526; Palmer *v.* Bosher, 71 N. C. 291; Bunn *v.* Pritchard, 6 Iowa 56; Shaffer *v.* Sundwall, 33 Iowa 579; Buhl *v.* Ball, 41 Hun (N. Y.) 61.

In New York when the affidavit has been made by an agent and he has omitted to show the source of his knowledge, the court is without power to allow an amendment when a motion is made to vacate the attachment because of such defect. Buhl *v.* Ball, 41 Hun (N. Y.) 61. The statement of facts is there essential to the acquirement of jurisdiction. *Contra*, Kirksville Sav. Bank *v.* Spangler, 56 Mo. App. 172.

3. Such a clerical error as stating in the grounds for attachment that the defendant "his" disposed of his property, etc., is without effect when the context clearly shows that the word "has" was intended. Corrigan *v.* Nichols, 6 Tex. Civ. App. 26, 24 S. W. Rep. 952.

4. Davidson *v.* Martin, 33 Miss. 530.

5. Alford *v.* Johnson, 9 Porter (Ala.) 320.

6. Emerson *v.* Detroit Steel and Spring Co., 100 Mich. 127, 58 N. W. Rep. 659; Emerson *v.* Spearman, 100 Mich. 127, 58 N. W. Rep. 659.

7. *Ex parte* Nicrosi, (Ala.) 15 So. Rep. 507.

to sign the affidavit may be corrected by amendment in Arkansas;[1] but not in Georgia.[2] The omission of the officer, who administered the oath, to attach the *jurat* is amendable.[3] And the venue may be added by amendment.[4] And where the certificate of the secretary of the state is necessary, it may be added by way of amendment.[5] Where an attachment is brought in aid of a suit at law, but is docketed separately, there is no error in allowing an amendment of the affidavit, showing the attachment to be in aid of the suit at law.[6] And in Mississippi an amendment, by putting upon the record the name of the party holding the legal title of the chose in action on which the suit was brought, was permitted.[7] And it was held that an affidavit which is uncertain, because the disjunctive is used between the statement of separate grounds, may be amended on motion made immediately after it is held insufficient by the court.[8]

In cases like the above, where the affidavit is not *void* for irregularities but amendable, and only *voidable*, it has a sufficient amount of vitality to protect persons acting under it, when no objection is raised to it in a direct proceeding. It can not be attacked collaterally.[9]

In amending an affidavit it should relate back to the time of commencement of the action, and will generally be insufficient

1. Fortenheim *v.* Claflin, 47 Ark. 49.

2. Cohen *v.* Manco, 28 Ga. 27.

3. Fortenheim *v.* Claflin, 47 Ark. 49.

4. Struthers *v.* McDowell, 5 Neb. 491; Skinner *v.* Beshoar, 2 Col. T. 383.

5. Lawton *v.* Kiel, 51 Barb. (N. Y.) 30, 34 How. (N. Y.) Pr. 465.

6. Roberts *v.* Dunn, 71 Ill. 46.

It will avoid the necessity of a motion to dismiss the attachment for want of a separate declaration, being filed therein at the return term. Roberts *v.* Dunn, 71 Ill. 46.

7. Tully *v.* Herrin, 44 Miss. 626.

8. Salmon *v.* Mills, 49 Fed. Rep. 333, 4 U. S. App. 101, 1 Cir. Ct. App. 278.

This was under a statute permitting an amendment to embrace any grounds for attachment that may exist up to the time of the first judgment on the same. Salmon *v.* Mills, 49 Fed. Rep. 333, 4 U. S. App. 101, 1 Cir. Ct. App. 278.

9. Booth *v.* Rees, 26 Ill. 45; Moore *v.* Mauck, 79 Ill. 391; Avery *v.* Good, 114 Mo. 290, 21 S. W. Rep. 815; Burnett *v.* McCluey, 92 Mo. 230; Sannoner *v.* Jacobson, 47 Ark. 31; Hogue *v.* Corbitt, (Ill.) 41 N. E. Rep. 219.

In Arkansas it is amendable as against interverners. Sannoner *v.* Jacobson, 47 Ark. 31. But see the cases following.

if its averments be in the present tense.[1] An amended petition filed after the commencement of the suit, and averring that the defendant is a non-resident of the state at the time of such filing, will not support an attachment previously issued.[2] Nor will an amended petition, alleging that the defendant is "then about" to do the act complained of, support an attachment issued at the commencement of the action.[3] It is said that *jurisdiction* can not be acquired by amendment without the issuance of an attachment after such amendment.[4] But in Missouri, by force of the statute, the amendment may embrace the same or any other cause of action.[5] And in Nebraska, when in furtherance of justice; but no new cause of an attachment may be added which existed when the action was brought.[6] A claim which the plaintiff did not own at the time of the seizure of property can not be afterwards purchased by him and asserted by way of amendment or otherwise.[7] However, the irregularities above referred to are not generally jurisdictional defects.[8] The supreme court of Wisconsin has said that if a *void* writ can be aided by amendment at all, it must not cut off the rights of intermediate parties.[9] But in Ohio it is said that no "amendment will be permitted which will enable a creditor . . to gain an advantage in the race of diligence over another creditor."[10] In North Carolina, by force of the code an affidavit, though wholly insufficient, may be amended by permission of the court.[11] And the granting of amendments in Maine is within the discretion of the court.[12] The circuit court of the

1. Bundy *v.* McKee, 29 Iowa 253; Robinson *v.* Burton, 5 Kan. 293.

2. Crouch *v.* Crouch, 9 Iowa 269.

3. Wadsworth *v.* Cheeny, 10 Iowa 257.

4. Pope *v.* Hibernia Ins. Co., 24 Ohio St. 481.

5. Norton *v.* Flake, 36 Mo. App. 698.

6. Brookmire *v.* Rose, 34 Neb. 227, 51 N. W. Rep. 840. Same principle in Jaffray *v.* Wolfe, 1 Okl. 312, 33 Pac. Rep. 945.

7. Farwell Co. *v.* Wright, 38 Neb. 445, 56 N. W. Rep. 984.

8. In Texas where the averment failed to show that the debt was not due, such omission was cured by an amendment filed after the debt matured. Panhandle Nat. Bank *v.* Still, 84 Tex. 339, 19 S. W. Rep. 479.

9. Whitney *v.* Brunette, 15 Wis. 61.

10. Patterson *v.* The Gulnare, 2 Disney (Ohio) 505; But see Sannoner *v.* Jacobson, 47 Ark. 31.

11. Brown *v.* Hawkins, 65 N. C. 645.

12. Butman *v.* Hobbs, 35 Me. 227.

United States, in Michigan, permitted an amendment to the affidavit, which right and justice required, although the statutes of the state did not give to the state court powers to have made such amendment had the case been pending therein.[1]

The questions how and when objections for mere irregularities in the affidavit must be raised will be considered more fully when we come to treat of the Dissolution of Attachment, but it may not be out of place to here state that a motion to quash, or plea in abatement, must be made or filed before pleading to the merits and entering upon the trial of the case.[2] An affidavit may be amended after a motion has been made to dismiss the attachment because of a particular defect.[3] But by pleading to the merits a party brings himself into court, and he can not thereafter be heard to object to the manner in which he was brought in.[4] Any objections are waived.[5] When the objection is pleaded to, the suit stands as if it had been brought in the usual manner.[6] As to what is such a general appearance, it is said that answering to the merits in the justice's court, going to trial, appealing from the judgment and noticing the cause for trial in the circuit court, is a waiver of defect and gives jurisdiction of the person.[7] And it is said that appearance, to have the cause put at the foot of the calendar, gives jurisdiction of the person;[8] that giving bond for the return of

1. Erstein *v.* Rothchild, 22 Fed. Rep. 61.

2. Bishop *v.* Fennerty, 46 Miss. 570; Stoney *v.* McNeil, Harper (S. C.) 156; Rice *v.* Hauptman, 2 Colo. App. 565, 31 Pac.Rep. 862; Woodruff *v.*Sanders, 18 Wis. 161; Enders *v.* Steamer Henry Clay, 8 Rob. (La.) 30; Watson *v.* McAllister, 7 Martin, (La.) 368.

3. Moline, Milburn and Stoddard Co. *v.* Curtis, 38 Neb. 520, 57 N. W. Rep. 161; Clarke Banking Co. *v.* Wright, 55 N. W. Rep. 1060, 37 Neb. 382.

In the latter case the affidavit stated on *information* that the defendant was a non-resident, a motion was made to dismiss the proceedings for that defect, and an amendment was allowed in order to make such averment positive. Clarke Banking Co. *v.* Wright, 55 N. W. Rep. 1060, 37 Neb. 382.

This averment may be made on information and belief in Missouri. Tufts *v.* Volkening, 122 Mo. 631, 27 S. W. Rep. 522, s. c. 51 Mo. App. 7.

4. Manhard *v.* Schott, 37 Mich. 234.

5. Gunn H. Co. *v.* Denison, 46 N. W. Rep. 940, 83 Mich. 40.

6. Barry *v.* Foyles, 1 Peters (U. S.) 311.

7. Blackwood *v.* Jones, 27 Wis. 498.

8. Orear *v.* Clough, 52 Mo. 55.

the property is a waiver of objection;[1] that appearance before judgment and execution sale, for the purpose of having the judgment set aside, is a general appearance and gives jurisdiction of the person;[2] and that a mere motion to dismiss the attachment gives jurisdiction of the person.[3] But it is further said that a party may appear and move to quash without submitting himself to the jurisdiction of the court.[4] He may limit his appearance to the purpose of the motion and filing written objections to the manner of service of process, and it will not be a general appearance.[5] And it is said that the appearance of a party, by his attorney, to move for dismissal of attachment, and to except to the jurisdiction of the court over him, can not be construed into a submission to the jurisdiction.[6] The appearance to move to quash an attachment, on account of the irregularity of the service of process, is not such an appearance to the action as waives alleged defects.[7] The appearance of a non-resident by attorney, to object for want of jurisdiction, and the withdrawal of such appearance by leave of the court, is not a submission of the person to the jurisdiction, but leaves the case as if there had been no appearance.[8]

The objection can not be taken in the court above for the first time.[9] It must be brought to the attention of the trial court.[10] A defective affidavit, filed in a case before a justice of

1. Dierolf *v.* Winterfield, 24 Wis. 143.

2. Anderson *v.* Coburn, 27 Wis. 558.

3. Whiting *v.* Budd, 5 Mo. 443.

But he may have time to plead. Whiting *v.* Budd, 5 Mo. 443.

4. Johnson *v.* Buell, 26 Ill. 66.

And in a suit against a corporation, by appearance and plea of *nul tiel* corporation, such appearance can not be taken for an appearance after amendment making party defendant a partnership. Inman *v.* Allport, 65 Ill. 540.

5. Crary *v.* Barber, 1 Colo. 172.

An order of the court reciting that the parties came with their attorney and on plaintiff's motion leave was granted to amend the sheriff's return and declaration, and the cause was continued, does not show a general appearance of the defendant. Crary *v.* Barber, 1 Colo. 172.

6. Bonner *v.* Brown 10 La. Ann. 334.

7. Petty *v.* The Frick Co., 86 Va. 501.

8. Graham *v.* Spencer, 14 Fed. Rep. 603.

9. Ryon *v.* Bean, 2 Metc. (Ky.) 137.

10. Lowry *v.* Stowe, 7 Porter (Ala.) 483; Burt *v.* Parish, 9 Ala. 211; Jones *v.* Pope, 6 Ala. 154.

By plea in abatement in Alabama. Jones *v.* Pope, 6 Ala. 154.

the peace, can not be objected to after the case has been appealed to the circuit.[1] But the fact that the attachment-plaintiff did not make a motion in the trial court for leave to amend the affidavit, does not deprive him of that right, where the trial court has dissolved the attachment at the instance of an intervener, refusing then to hear the plaintiff.[2] The United States court, in one case in which the issue on attachment was tried by a jury and found for the plaintiff, granted a new trial, and then, on motion to vacate the attachment, held the affidavit insufficient, and sustained the plaintiff's motion to amend when, from its recollection of the evidence on the jury trial, the amendment would be in the furtherance of justice.[3] But an amendment is not authorized after judgment and sale, and if it was, the new affidavit would not render the title valid which was acquired under such sale.[4] However, if the affidavit fails to allege the defendant's non-residence, and no motion be made to quash, and after personal service the defendant appears and defends the cause on its merits, a sale of the attached property, after judgment for plaintiff, and under execution thereon, can not be set aside;[5] nor can other creditors than the plaintiff question the insufficiency of the attached property.[6] Where the court has had jurisdiction, objection will come too late in an action on the bond in which the proceedings are collaterally attacked.[7] By failing to object in apt

1. Horton *v.* Miller, 84 Ala. 537, 4 So. Rep. 370; Staggers *v.* Washington, 56 Ala. 225.

Quere: Can affidavit be amended after levy? Taylor *v.* Smith, 17 B. Mon. (Ky.) 536.

In Arkansas the affidavit of a landlord on an attachment for rent may be amended after the attachment has *issued*. Rogers *v.* Cooper, 33 Ark. 406.

And even after it has been quashed for informality of the affidavit it may be amended by inserting an omitted fact which existed when it was made. Nolen *v.* Royston, 36 Ark. 561.

2. Sannoner *v.* Jacobson, 47 Ark. 31.

3. Salmon *v.* Mills, 49 Fed. Rep. 333, 4 U. S. App. 101, 1 Cir. Ct. App. 278.

4. Greenvault *v.* F. & M. Bank, 2 Doug. (Mich.) 498.

5. Bollinger *v.* Gallagher, 144 Pa. St. 205, 22 Atl. Rep. 815; Landenberg *v.* Commercial Nat. Bank, (N. Y.) 32 N. Y. S. 873; 24 Civ. Proc. Rep. 234.

6. Van Camp *v.* Searle, 29 N. Y. S. 757.

Such an objection is only available to other creditors than the plaintiff on a motion to vacate the attachment. Van Camp *v.* Searle, 29 N. Y. S. 757.

7. Huff *v.* Hutchinson, 14 How. (U. S.) 586.

time, an *irregularity* is waived,[1] but where there is a *lack of jurisdiction*, the question may be raised at any time, as will be more fully shown under the head of "Review of Attachment Proceedings."[2]

It sometimes happens that the affidavit is misplaced and can not be found in the files. If this happens while the case is pending, the fact that an affidavit was filed may be proven like any other fact.[3] If the affidavit does not appear in the record after judgment, it will not be treated as a nullity.[4] For after judgment is rendered, in the absence of anything to the contrary when attacked, it will be presumed the affidavit was sufficient.[5]

1. Landfair *v.* Lowman, 50 Ark. 446, 8 S. W. Rep. 188.
2. See *post*.
3. Simpson *v.* Minor, 1 Blackf. (Ind.) 229.
4. Biggs *v.* Blue, 5 McLean (U. S. C. C.) 148.
5. Head *v.* Daniels, 38 Kan. 1, 15 Pac. Rep. 911.

CHAPTER VIII.

THE BOND.

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§ 153. **Object and necessity of the bond.**—Almost every attachment statute requires as a prerequisite to the issuance of a writ of attachment, that the plaintiff give a bond with sureties in a sum specified, payable under specified conditions.

The manifest object of the statutes in requiring a person to give a bond before he can have a process for the seizure of his debtor's effects, is to enable the said debtor to have a more certain and effective remedy in the event of the process proving to have been wrongfully and maliciously sued out, than he would have if his only recourse were to a common law action for malicious prosecution.

The action of attachment is, because of its harshness, not favored by the courts, as we have before seen,[1] and being wholly a creation of the statute, the court gets only a special and limited jurisdiction in attachment cases. No presumption arises in favor of such jurisdiction. One seeking the aid of a court in such a case must bring himself manifestly within the provisions of such statute, or the court will not acquire sufficient jurisdiction of his case to be enabled to grant him the aid sought. All the requirements of the statute must be complied with, or the court will get neither authority to hear nor power to determine the matter. The bond being an additional requirement to the making and filing of an affidavit, a strict compliance with such requirement is then of necessity incumbent upon the creditor who would invoke the aid of a process of such severity as the writ of attachment.[2]

1. See *ante*, § 8.

2. Since the statute provides that the officer shall require bond and security of the applicant for attachment, the writ will be invalid unless such bond be given. Rogers *v.* E. M. Birdsall Co., 72 Ga. 133.

A judgment in an attachment suit is void as to a person made a party thereto by amendment, and against whom no bond is filed. Nor can such defendant waive error. Baldwin *v.* Ferguson, 35 Ill. App. 393.

However, the Nebraska code authorizes attachment of property of a non-resident, without bond, and is valid. Marsh *v.* Steele, 9 Neb. 96.

A deposit of money will not be taken in lieu of an attachment bond under the New York code. Bate *v.* McDowell, 48 N. Y. Superior Ct. 219.

Where all the defendants against whom an attachment is sued out are non-residents, a bond need not be given, although there be other defendants in the main action who are residents. Head *v.* Daniels, 38 Kan. 1, 15 Pac. Rep. 911.

The United States government, however, has the right to use, in its sovereign capacity, all the conservatory writs common to other suitors, and, when using the process of attachment in a suit against a debtor, is exempt from giving to the debtor the obligation required from all other creditors before the issuing of the process.[1] Nor is the state required to give a bond when suing out an attachment in its own courts.[2] In Kansas, Nebraska and Mississippi, no bond is required as a condition precedent to the issuance of an attachment against the property of a foreign corporation or non-resident debtor.[3] And in Virginia a bond is not required unless the sheriff is directed to take the property into his possession.[4] These instances are exceptions to the general rule.

§ 154. **When the bond must be executed and filed.**[5]—The general rule is, that before a plaintiff can sue out a judicial attachment it is necessary to give a bond to indemnify the defendant for any injury he may sustain by reason of the abuse of the process.[6] The bond must be given before the attachment issues.[7] And it should accompany the affidavit.[8] An attachment taken out without a bond is void. The effect is to abate the writ; and any judgment entered thereon is erroneous and will be set aside.[9] The attachment will be quashed if it issues be-

1. United States *v.* Murdock, 18 La. Ann. 305; United States *v.* Ottman, 3 MacArthur (D. C.) 73.

2. Renkert *v.* Elliott, 11 Lea (Tenn.) 235.

3. Simon *v.* Stetter, 25 Kan. 155; Ballinger *v.* Lantier, 15 Kan. 608; Marsh *v.* Steele, 9 Neb. 96; Olmstead *v.* Rivers, 9 Neb. 234; Baird *v.* Georgia Pac. Ry. Co., (Miss.) 12 So. Rep. 547.

4. Kenefick *v.* Caulfield, 88 Va. 122, 13 S. E. Rep. 348.

5. See "Failure to give sufficient bond—Who, how and when to object because thereof," *post*, § 177, and "Amendment of the bond," *post*, § 179.

6. Briggs *v.* Smith, 13 Tex. 269.

7. Snelling *v.* Bryce, 41 Ga. 513; Kellogg *v.* Miller, 6 Ark. 468; Edwards *v.* Cooper, 28 Ark. 466; Benedict *v.* Bray, 2 Cal. 251; Starr *v.* Lyon, 5 Conn. 538; Clay *v.* Tapp Leather Co., 79 Ga. 596, 7 S. E. Rep. 256; Enneking *v.* Clay, 79 Ga. 598, 7 S. E. Rep. 257; Bailey *v.* Clay, 79 Ga. 600, 7 S. E. Rep. 258; Wagener *v.* Booker, 31 S. C. 375, 9 S. E. Rep. 1055; Cousins *v.* Brashier, 1 Blackf. (Ind.) 85; Graham *v.* Burckhalter, 2 La. Ann. 415.

8. Benedict *v.* Bray, 2 Cal. 251; Boyd *v.* Boyd, 2 Nott & McCord (S. C.) 125; Cosner's Adm'r *v.* Smith, 15 S. E. Rep. 977, 36 W. Va. 788.

9. Bradley *v.* Kroft, 19 Fed. Rep. 295; Didier *v.* Galloway, 3 Ark. 501;

fore the bond is given, though it be given on the same day.[1] Such bond as is required by the statute is a prerequisite to the issuing of the writ, and where the bond offered is not such as is required by the statute, it is the same as though there was no bond. In either case a motion to dismiss is pertinent.[2] The prescription of the law must be strictly observed under pain of nullity.[3]

An attachment issuing without the affidavit and bond required by the statute is void and the error can not be cured by the appearance and plea of the defendant.[4] The omission can not be waived so as to uphold the attachment;[5] nor will the substitution of another bond cure the error,[6] though such bond be filed before a motion to quash the writ is made.[7] The bond,

Ford *v.* Woodward, 10 Miss. (2 Smed. & M.) 260; Lewis *v.* Butler, (Ky.) Sneed 246; Davis *v.* Marshall, 14 Barb. (N. Y.) 96.

1. Hucheson *v.* Ross, 2 A. K. Marshall (Ky.) 349.

But a recital in the bond that the plaintiffs "have this day sued out an attachment," does not import that the bond was executed after the writ issued. Wright *v.* Ragland, 18 Tex. 289.

2. Bank of Alabama *v.* Fitzpatrick, 4 Humph. (Tenn.) 311.

3. Graham *v.*Burckhalter,2 La.Ann. 415.

In Kentucky the bond must be executed before the clerk or his legally authorized deputy *in his office*, and unless such bond is given in the manner provided the attachment will be void. Horne *v.* Mitchell, 7 Bush (Ky.) 131.

In Kansas, in all cases where an order of attachment is issued, except where the defendant is a non-resident of the state, a foreign corporation, an attachment bond must be given by the plaintiff. When this is not done the attachment will be dissolved on motion of the defendant. Ballinger *v.* Lantier, 15 Kan. 608.

A North Carolina statute required not only that the defendant give bond and make affidavit, but that he see that they were returned. If he did not do this his attachment would fail. State Bank *v.* Hinton, 1 Dev. (N. C.) 397.

In New York a justice of the peace has no authority to grant the writ unless there has been a strict compliance with the statutory provisions. Kelly *v.* Archer, 48 Barb. 68; Davis *v.* Marshall, 14 Barb. 96; Bennett *v.* Brown, 4 N. Y. (4 Comst.) 254. And if he does he becomes a trespasser, and he, as well as the party procuring it, will be liable as such. Barkelo *v.* Randall, 4 Blackf. (Ind.) 476; Davis *v.* Marshall, 14 Barb. (N. Y) 96.

4. Tyson *v.* Hamer, 2 How. (Miss.) 669.

5. Houston *v.* Belcher, 12 Smed. & M. (Miss.) 514.

6. Houston *v.* Belcher, 12 Smedes & M. (Miss.) 514; Bradley *v.* Kroft, 19 Fed. Rep. 295.

7. Osborn *v.* Schiffer, 37 Tex. 434.

to support an attachment, must be filed before the writ is issued and can not afterwards be filed *nunc pro tunc*.[1] Where, however, a bond has been filed which is not absolutely void, but voidable only because of defects which are amendable by virtue of the statute, a subsequent good bond may be filed and approved by way of amendment, and the proceeding will thereby become valid from the beginning.[2]

While the issuance of the writ of attachment before the execution and filing of a bond is absolutely void, though a bond may be thereafter filed on the same day,[3] yet, where the bond bears even date with the writ, it will be presumed that the bond was taken and approved before the granting of the attachment, unless the contrary is made to appear.[4] But if the bond recites that the writ is previously issued and there is nothing upon the record to show to the contrary, the writ will be quashed.[5] If, however, the writ shows that it issued before the giving of the bond, the contrary recital of the bond will be no ground for motion to quash the writ.[6] Although it is expressly prescribed in some statutes that the affidavit and bond must be made and filed on the day the writ is issued,[7] yet where no such statute exists it is reasonably held that a difference in

1. Stevenson *v.* Robbins, 5 Mo. 18. See Blake *v.* Sherman, 12 Minn. 420.

2. McCraw *v.* Welch, 2 Col. T. 284; *vide* Illinois Attachment Act.

And see below a few states deeming it only an amendable irregularity.

And in a collateral suit, both the original and amended bonds may be received in evidence to show the regularity of the attachment proceedings. McCraw *v.* Welch, 2 Colo. T. 284.

3. Hucheson *v.* Ross, 2 A. K. Marshall (Ky.) 349.

4. McKenzie *v.* Buchan, 1 Notts & McCord (S. C.) 205.

5. Root *v.* Monroe, 5 Blackf. (Ind.) 594. See McClanahan *v.* Brack, 46 Miss. 246.

A recital does not make it appear that the writ issued first. Wright *v.* Ragland, 18 Tex. 289.

A recital that the suit was brought in the commissioner's court at a time before the court was in existence is fatal. Bonner *v.* Brown, 10 La. Ann. 334.

6. Summers *v.* Glancey, 3 Blackf. (Ind.) 361; Reed *v.* Bank of Kentucky, 5 Blackf. (Ind.) 227.

But the recital of the bond can not be contradicted by parol evidence. Reed *v.* Bank of Kentucky, 5 Blackf. (Ind.) 227.

7. See *ante*, § 128, "When the Affidavit to be Made."

the date of the affidavit and bond[1] is not *ipso facto* ground for dismissal of the attachment, and unless there are very strong features of injustice the propriety of the proceeding should be tested by plea in abatement, on the trial of which the question is whether the attachment was wrongfully sued out at the *time* of its issuance, and if the condition of things changed between the dates of the affidavit and the issuance of the writ.[2]

The failure of the plaintiff to file a bond is ground for a motion to quash the attachment, but it is no ground of demurrer to the cause of action.[3]

It has been said in Kentucky that, although the statute declares that an attachment without a bond is void, yet such statute is only directory.[4] When an attaching creditor in South Carolina or Ohio files a proper affidavit entitling him to an attachment, his failure to file the statutory undertaking for the indemnity of the defendant does not render the attachment void, for it is a mere irregularity, of which the defendant in attachment alone can take advantage.[5] In Missouri and Iowa, when an attachment is sued out in vacation, the bond may be taken and approved by the sheriff after the issuance of the writ, if offered before he makes return thereon at the next

1. In this case the affidavit bearing date the 24th day of November, and the bond bearing date the 12th of December following.

2. McClanahan *v.* Brack, 46 Miss. 246.

A mistake in the date of the year is amendable. McClanahan *v.* Brack, 46 Miss. 246. See *post*, § 179. See as to ancillary proceedings, Wheeler *v.* Farmer, 38 Cal. 203.

An attachment was once issued on the ground that the defendant was about to remove his property from the state. Some years afterwards the same plaintiff made an affidavit and set forth the pendency of the attachment; that the defendant had become a non-resident; and prayed an *alias* writ, which was issued and levied upon the defendant's real estate. It was held that the second attachment was not an *alias*, but an original proceeding, founded on a different cause from the former, and required a new bond. Jeffries *v.* Dancey, 44 Miss. 693.

3. Alexander *v.* Pardue, 30 Ark. 359.

4. Banta *v.* Reynolds, 3 B. Mon. (Ky.) 80.

And that the process is *prima facie* evidence of jurisdiction, and will protect the officer or party acting thereunder. Banta *v.* Reynolds, 3 B. Mon. (Ky.) 80.

5. Wigfall *v.* Byne, 1 Rich. L. (S. C.) 412. O'Farrell *v.* Stockman, 19 Ohio State 296.

How the advantage to be taken, see *post*, § 177.

term of the court.[1] And in Missouri where an improper bond has been filed, a motion to dismiss will not be granted if the plaintiff offers to substitute a good and perfect one in its place, or does so by order of the court.[2] And in Minnesota, although a bond be not given before the attachment writ issues, it may be given afterwards *nunc pro tunc*.[3]

§ 155. Formal requisites of the bond—(a) Generally.—Where a form of bond for attachment is prescribed by the statute it is the better practice always to follow such form. In fact in a few instances the form prescribed by the statute must be followed in order to give the court jurisdiction, and in those cases, if not followed, the proceeding, will of course, be void.[4] An attachment bond which literally follows the form prescribed by the statute is always sufficient.[5] However, the form prescribed by the statute need not literally follow the words of the enacting statute.[6] An immaterial variance from the prescribed form will not vitiate the bond. "All bonds agreeing in substance with that prescribed in the act are valid."[7] Furthermore, the bond may vary from the statutory requirement and still be a good common law bond,[8] provided it does not contravene public policy nor violate a statute.[9] And it may be stated as a general rule that where a prescribed form is not required to be followed absolutely, the plaintiff need not execute the bond prescribed by the statute if a bond good in

1. Stevenson *v.* Robbins, 5 Mo. 18; Budd *v.* Durall, 36 Iowa 315.

2. McDonald *v.* Fist, 53 Mo. 343; Jasper County *v.* Chenault, 38 Mo. 357. The bond must be given with sureties as required by the statute. A bond by a plaintiff alone is a nullity. Jasper County *v.* Chenault, 38 Mo. 357.

3. Blake *v.* Sherman, 12 Minn. 420. This is contrary to the general rule. See *supra*.

4. Van Loon *v.* Lyons, 61 N. Y. 22; McIntyre *v.* White, 5 How. (Miss.) 298; Bank of Alabama *v.* Fitzpatrick, 4 Humph. (Tenn.) 311.

5. Proskey *v.* West, 16 Miss. (8 Smedes & M.) 711; Love *v.* Fairfield, 10 Ill. 303; Singleton *v.* Wofford, 4 Ill. 576.

6. Amos *v.* Allnutt, 2 Smedes & M. 215.

7. O'Neal *v.* Owens, 1 Haywood (N. C.) 365.

8. State *v.* Thompson, 49 Mo. 188; Williams *v.* Coleman, 49 Mo. 325; Barnes *v.* Webster, 16 Mo. 258; Baird *v.* Walker, 12 Barb. (N. Y.) 298; Foxworth *v.* Burckhalter, 3 La. Ann. 365.

9. Sheppard *v.* Collins, 12 Iowa 570.

form, for a sufficient amount and payable to the defendant, be executed by him or some one in his behalf, and the same be filed and approved.[1] And where no form is prescribed any bond will do, if the conditions be such that the plaintiff can be made to respond in damages to the defendant in the event of any illegal conduct on his part.[2]

§ 156. (b) **Title court.**—The title of the court and the term to which the attachment is returnable should be mentioned in the bond.[3] But a bond which literally follows the form prescribed by the statute is good, although it does not state in what court the proceedings are taken.[4] Where there was a literal transcript from the statute, and the blanks merely filled in, it was said: "It must be an extraordinary case indeed, when the court shall hold that a bond is insufficient to authorize the issuance of attachment which the attachment law itself says shall be sufficient."[5]

§ 157. (c) **Title cause.**—The title of the cause may properly be mentioned in the bond, but if the bond does not show that it was given in any cause or that there was any cause pending, it is good.[6] The recital of the bond, however, should show who are the parties to the suit, or no liability can be fixed or action on the bond sustained.[7]

§ 158. (d) **The date.**—Where a common law bond is sufficient, the attachment bond need not be dated. A common law bond takes effect by delivery.[8] Where an error is made in the date of the year, it is amendable in Mississippi,[9] and in other states permitting amendments for informalities.[10] And where

1. Mandel *v.* Peet, 18 Ark. 236.

2. Leach *v.* Thomas, 2 Nott & McCord (S. C.) 110.

3. Lawrence *v.* Yeatman, 3 Ill. (2 Scam.) 15.

4. Singleton *v.* Wofford, 4 Ill. 576.

5. Love *v.* Fairfield, 10 Ill. (5 Gilm.) 303.

6. Janes *v.* Tomlinson, 30 Ga. 540. And if it were not sufficient it could be amended, in Georgia—James *v.* Tomlinson, 30 Ga. 540—and in other states where defects are amendable, see *post*, §179.

7. See *post*, § 161, "Recital of Conditions."

8. Plumpton *v.* Cook, 2 A. K. Marshall (Ky.) 450.

9. McClanahan *v.* Brack, 46 Miss. 246.

10. See *post*, § 179.

a mistake in the date is amendable the court will continue the case, to enable counsel to prove such mistake and to make an amendment.[1]

§ 159. (e) The signing.—Where the statutes require that a bond to support an attachment must be signed by the plaintiff, or his agent, or attorney (and most states do so require), a bond signed by a person who is neither plaintiff, his agent, nor attorney, but a mere stranger, is not sufficient to sustain an attachment, and no suit on such bond can be maintained.[2] But under statutes which require a bond to be given "on the part of the plaintiff" with sureties before an attachment writ can issue, the plaintiff himself need not sign the bond.[3] Where it is required that a bond be executed by the plaintiff, his agent, or attorney, prior to the issuance of the writ, such bond, when executed by such agent or attorney, may be, in form, his personal obligation, and may be executed by him in his own name, describing himself as such agent or attorney, and need not be executed in the name of or on behalf of his principal, the plaintiff.[4] And when such bond is not in the name of such plaintiff, but is the personal obligation of his agent, no power authorizing its execution by the agent need be shown under seal.[5] The signature to the bond may be amended if it is not lawful, even when it is the name of the plaintiff signed by the plaintiff's attorney, without authority.[6] When the authority of the agent to sign the bond is questioned, the production of a power of attorney, under private signature, at the trial of the exception, is no proof of its existence at the suing out of the attachment, even though it purport to bear the same date. But

1. Snelling *v.* Bryce, 41 Ga. 513.

2. Booker *v.* Smith, 38 S. C. 228, 16 S. E. Rep. 774; Ford *v.* Hurd, 12 Miss. (4 Smed. & M.) 683; Meyers *v.* Rauch, 4 Pa. Dist. Rep. 333.

3. Pierse *v.* Miles, 5 Mont. 549; Langstaff *v.* Miles, 5 Mont. 554; Black Hills Mercantile Co. *v.* Gardiner, (S. D.) 58 N. W. Rep. 557, 559; Sprague *v.* Gardiner, (S. Dak.) 58 N. W. Rep. 559; see *post*, § 169.

4. Conklin *v.* Goldsmith, 5 Fla. 280; Walbridge *v.* Spalding, 1 Doug. (Mich.) 451.

5. Walbridge *v.* Spalding, 1 Doug. (Mich.) 451.

6. Anthanissen *v.* Brunswick & S. A. Steam Towing and Wrecking Co., 92 Ga. 409, 17 S. E. Rep. 951; Anthanissen *v.* Dart, 92 Ga. 409, 17 S. E. Rep. 951.

where the agent is examined as a witness, and establishes the date to be the same, it will prove its existence at that time.[1] The omission of the Christian name of the principal obligor in the body of an attachment bond becomes immaterial when he executes the same by his full name.[2] The principal obligors in an attachment bond may sign it by their partnership name merely.[3] And it is no objection to an attachment bond, given by a firm whose individual names appear in the petition, that the bond refers in the body to the individuals, while it is signed by the firm name merely; nor is it an objection that it was made payable to the individual members of the firm sued.[4]

§ 160. (f) **The seal.**—Generally, there can be neither a statutory nor common law bond without a seal. To be a bond it must be a sealed instrument. It must have a seal, or the word seal, or a scroll by way of a seal, or it will not support attachment, nor can it be sued on as a bond.[5] In Texas, the statute dispensing with seals or scrolls to bonds, except those given by corporations, applies to attachment bonds.[6] And in Ohio, the undertaking required by the code is not a *specialty*, and a seal is not required.[7]

No objection can be made to an attachment because of its having the condition written beneath the signatures and seals of the obligors.[8]

§ 161. **Recitation of conditions—(a) Names of parties, etc.**—The bond or undertaking on attachment is an original, independent contract on the part of the sureties and must be

1. McCall *v.* Henderson, 11 La. Ann. 209.

2. Walbridge *v.* Spalding, 1 Dougl. (Mich.) 451.

3. Claflin *v.* Hoover, 20 Mo. App. 314.

4. Gray *v.* Steedman, 63 Tex. 95.

5. State *v.* Thompson, 49 Mo. 188; State *v.* Chamberlin, 54 Mo. 338; State *v.* Eldridge, 65 Mo. 584; Wallace, Elliott & Co. *v.* Plukart, 6 Pa. Co. Ct. R. 151; Lea *v.* Vail, 3 Ill. 473. The lack of a seal to the paper filed as a bond is amendable. Lee *v.* Vail, 3 Ill. 473. In states allowing amendments of informalities of the bond see *post*, § 179.

6. Bernhard *v.* De Forest, 36 Tex. 518.

7. McLain *v.* Simington, 37 Ohio State 484.

8. Melvin *v.* S. B. Gen. Shields, 15 Ark. 207.

construed in connection with the statute which authorizes it.[1] There must always be a substantial conformity with the provisions of the attachment act relating to the bond, or it will be insufficient and unavailing.[2] It must be conditioned to prosecute the suit with effect, or pay all costs and damages that may be recovered in any action that may be brought for the wrongful suing out of the attachment.[3] And when no form is given by the statute, the bond must at least be so conditioned that the plaintiff can be made to respond in damages to the defendant for any illegal conduct on his part in the attachment proceedings.[4] If the statute requires the plaintiff's undertaking to be conditioned for the payment of all damages, an undertaking to answer for the *wrongful suing out of the attachment* is not a compliance with it.[5] When an attachment bond is signed by two plaintiffs in attachment, and the condition is expressed in the singular number, viz., "that he will pay all such damages and costs as shall be adjudged against him for wrongfully suing out the attachment," the same is insufficient and the attachment should be quashed.[6] Therefore, in a case where the bond taken was the bond of one of the partners, with surety, reciting that such partner had obtained the attachment, and conditioned that if *he* should not prevail in the suit, then *he* would pay all costs and damages which should be recovered against *him*, it was held that such bond was not good, and that the attachment was therefore illegal and void.[7] And where the provisions of the attachment act required a bond as one of the conditions to the issuing of the writ, it will not be satisfied by the execution of a covenant to pay one hun-

1. Frankel *v.* Stern, 44 Cal. 168.

2. Hisler *v.* Carr, 34 Cal. 641; O'Neal *v.* Owens, 1 Hayw. (N. C.) 365; State *v.* Thompson, 49 Mo. 188; Baird *v.* Walker, 12 Barb. (N. Y.) 298; Foxworth *v.* Burckhalter, 3 La. Ann. 365; Baars *v.* Gordon, 21 Fla. 25; Kahn *v.* Herman, 3 Ga. 266.

3. Lucky *v.* Miller, 8 Yerg. (Tenn.) 90.

But no condition is necessary that the obligor shall pay such damages whether the suit is prosecuted with effect or not. Lucky *v.* Miller, 8 Yerg. (Tenn.) 90.

4. Leach *v.* Thomas, 2 Nott & McCord (S. C.) 110.

5. Pierse *v.* Miles, 5 Mont. 549.

6. Solinsky *v.* Young, (Tex. App.) 17 S. W. Rep. 1083.

7. Jones *v.* Anderson, 7 Leigh (Va.) 308.

dred dollars, *or* to pay the damages and costs, etc.; and where only such a covenant is executed, the officer does not acquire any jurisdiction to issue an attachment.[1] Under a Georgia statute requiring that the bond be conditioned to pay all costs in case the plaintiff shall discontinue or be cast in his suit, and also all damages which may be recovered for suing out the attachment, a bond was given containing these conditions and the further condition "that the plaintiff should prosecute his suit with effect," and it was held that the bond was in substantial conformity with the statute.[2] A bond drawn to certain parties, without describing them as the defendants (though they were such in fact), and reciting that it was upon condition that the plaintiffs should "pay to the *defendants* all such damages," etc., without stating who the defendants were, was not sufficient under a Texas statute which required that it shall be payable to the defendants in the action.[3]

Any condition in the bond beyond that which is required by the attachment law is void, but if a bond otherwise sufficient contain such further condition, the bond will not be voided by such condition. It will be good to the extent of its legal conditions, and any further condition or covenant will be treated as surplusage.[4] And the unnecessary condition will not bind the surety.[5] But where the plaintiff gives a bond to prosecute the "action" with effect, instead of the "attachment," as required by the attachment act, the bond will be fatally defective and the attachment must be quashed.[6]

In many states it is held that, although the bond given does not contain all of the statutory conditions, it may be a good bond as to the conditions which it does contain,[7] and may be a valid contract between the parties at common law.[8] A misrecital in the bond, of the return term of the writ, will not give

1. Homan *v.* Brinckerhoff, 1 Den. (N. Y.) 184.
2. Kahn *v.* Herman, 3 Ga. 266.
3. Rohrbough *v.* Leopold, 68 Tex. 254, 4 S. W. Rep. 460.
4. Ranning *v.* Reeves, 2 Tenn. Ch. 263.
5 Baker *v.* Morrison, 4 La. Ann. 372; Johnson *v.* Imboden, 7 La. Ann. 110.
6. Starbird *v.* Koonse, (Pa. Com. Pl.) 10 Pa. Co. Ct. Rep. 449.
7. State *v.* Berry, 12 Mo. 376.
8. Emanuel *v.* Laughlin, 11 Miss. (3 Smedes & M.) 342.

ground to quash the attachment, nor affect the validity of the bond.[1] A bond setting out the names of the individuals composing the plaintiff firm, and conditioned "that the above-named" firm, "plaintiffs in attachment against said" defendants, "will prosecute," etc., will be good and effective, though the names of all the individuals who compose the plaintiff firm be not repeated in the latter part of the bond; and every member of the firm will be bound thereby.[2] Nor will the omission of the name of the surety, in the recitation, affect either the validity of the undertaking or the allegation of the surety.[3] And though a bond will be defective if it does not describe the parties to the suit,[4] yet where the wrong name is used in the recitation it will be sufficient, if from the text of the bond there can be no doubt of the person intended. The court will look to the whole instrument and thereby determine, if possible, who is the party intended.[5]

Where a word is omitted by mistake in an attachment bond, when by examining it and the statute authorizing it the intended word can be determined, the omitted word may be supplied and the contract read as if it had been expressed.[6]

1. Houston *v.* Belcher, 20 Miss. (12 Smedes & M.) 514.

2. Munzenheimer *v.* Manhattan Cloak and Suit Co., 15 S. W. Rep. 389, 79 Tex. 318.

3. McLain *v.* Simington, 37 Ohio St. 484; Baars *v.* Gordon, 21 Fla. 25.

4. Schrimph *v.* McArdle, 13 Tex. 368.

5. Affeld *v.* The People, 12 Ill. App. 502.

6. Frankel *v.* Stern, 44 Cal. 168; following People *v.* Judges of Oneida, 1 Wend. (N. Y.) 28.

The following is given as an example of a case in which the word "and" was supplied by the court and read in the place where the word "or" was written in the bond:

A debtor assigned his property for the benefit of certain creditors. A creditor not included in such assignment attached the assigned property. The assignee, to further the disposal of the property, executed an obligation in favor of the attaching creditor containing the conditions that if the attachment was not sustained, or if sustained and a "judgment" should not be satisfied within thirty days by him (the assignee), the bond should be void. The bond concluded with these words, "it is understood that, by judgment is meant final judgment, and that the said assignee will, in fulfillment of this obligation, pay any judgment which may be rendered in the attachment suit aforesaid against said debtor *or* against himself as assignee." Such correction was made because it was deemed that reference was intended to be had to such judgments only as would bind the attached prop-

Rule regarding omissions in attachment bonds:—It must be remembered that the principle that judicial bonds are to be construed according to the law under which they are given, in regard to the rejection of surplusage and supplying omissions, does not apply when the question is not what the eventual liability of parties will be to such bonds after they have accomplished their purpose, but when the question is whether the conditions precedent prescribed by law and essential to the maintenance of the attachment have been strictly complied with. Such compliance is jurisdictional and can not be affected by presumptions and implications, nor by collateral evidence.[1]

§ 162. (b) **Must show whose and what property attached.**—The recital in an attachment bond should indicate unmistakably, and without the aid of extraneous proof, what or whose property is to be attached, so that the party aggrieved by the execution of the writ may have his recourse upon the bond and surety thereto without resorting to other methods of connecting the one with the other.[2]

§ 163. **Amount or penalty of the bond.**—The undertaking being given for the indemnity of the defendant against any loss which he may sustain by reason of the wrongful suing of the attachment, it is manifestly necessary that a penalty be named therein. A bond being required by the statute, no jurisdiction will be obtained by the court in which the proceedings are sought to be begun, unless a complete and valid bond be executed and filed. The statement of a penalty is an essential element of a valid bond.[3] Furthermore, if the bond is silent as to the penalty, the defendant in attachment can have no action thereon in the event of his being damaged because of

erty. Hardcastle *v.* Hickman, 26 Mo. 475.

Since irregularities in the *form* of the condition in the bond or in the number of sureties, do not go to the jurisdiction, they can not avoid a judgment obtained without a motion to quash. Kramer *v.* Wellendorff, (Pa.) 10 Atl. Rep. 892.

1. Lehman *v.* Broussard, 45 La. Ann. 346, 12 So. Rep. 504.

2. Han *v.* Ruse, 35 La. Ann. 725.

3. Lehman *v.* Broussard, 45 La. Ann. 346, 12 So. Rep. 504.

the wrongful issuing of so harsh a process.[1] While the amount of the demand need not be named, because the sufficiency of the bond may be tested by comparing it with the affidavit,[2] yet it is evident that the amount in litigation, as stated in the affidavit, should be the basis of calculation in determining what the penalty shall be for a wrongful resort to the action. A less amount could not compensate the defendant, should sufficient of his property be seized to satisfy the demand, and such bond would be wholly inadequate.[3] Every statute makes this a foundation to be used in determining the amount for which the bond shall be given. Some require that the bond exceed the demand by one-half, others that it be double the amount for the recovery of which the action is brought, etc. There being little uniformity in this regard, the statute of the state in which the action is to be brought must be consulted to ascertain how to estimate the amount of the indemnity to be given in such case, and the rule it lays down must be strictly followed in the computation.[4] For a bond in less than such amount will be utterly void.[5] But although given for more than the required amount, it is nevertheless sufficient.[6]

The amount of the demand named in the affidavit, for the recovery of which the attachment is sued out, need not be

1. Copeland *v.* Cunningham, 63 Ala. 394; Louisville, N. A. & C. Ry. Co. *v.* Lake, 5 Ind. App. 450, 32 N. E. Rep. 590.

2. Strong *v.* Lake Wier C. & L. Ass., 25 Fla. 765, 6 So. Rep. 882.

3. Samuel *v.* Brite, 3 A. K. Marshal (Ky.) 317; Willman *v.* Freidman, (Idaho) 35 Pac. Rep. 37.

4. Saulter *v.* Butler, 10 Ga. 510; Shockley *v.* Davis, 17 Ga. 175; Marnine *v.* Murphy, 8 Ind. 272; Hamill *v.* Phenicie, 9 Iowa 525; Erwin *v.* Com. & R. R. Bank, 12 Rob. (La.) 227; Miller *v.* Chandler, 29 La. Ann. 88; Brown *v.* Whiteford, 4 Rich. (S.C.) 327.

5. Hamble *v.* Owen, 20 Iowa 70; Martin *v.* Thompson, 3 Bibb (Ky.) 252; Griffith *v.* Milwaukee Harvester Co., (Iowa) 61 N. W. Rep. 243.

6. Tanner & D. E. Co. *v.* Hall, 22 Fla. 391; Bourne *v.* Hocker, 11 B. Mon. (Ky.) 23; Lawrence *v.* Featherston, 18 Miss. (10 Smedes & M.) 345; Hibbs *v.* Blair, 14 Pa. St. 413.

Where the amount of the penalty named in the bond is less than that required by the statute, the defect can not be cured by amendment, and the attachment should be dissolved on motion of the defendant, although the assets of the defendant have been placed in the hands of a receiver after the levy, to be by him administered for the benefit of all creditors, and the result of quashing the attachment would be to benefit other attaching creditors, because of the statute providing that an attachment issued

mentioned in the bond; but the bond being otherwise sufficient, such mention will not invalidate it.[1]

§ 164. (a) **Interest to be included, when.**—When a specific amount of interest is claimed by the affidavit in addition to the debt, the *amount* of the "sum of the demand" is the proper basis of calculation for determining the amount of the penalty to be named in the bond.[2] And when the plaintiff claims a certain sum with the interest at a certain rate, a bond in an amount based upon the principal exclusive of the interest is insufficient in Kentucky. It prevents the plaintiff from his allowance of interest on the trial.[3] And in Louisiana it is fatal to the attachment, as it can not be cured by subsequently furnishing a bond for a sufficient amount.[4] The amount must be based upon the sum of the principal and interest accrued to the date of the filing of the petition or affidavit.[5] But where a certain sum is claimed, with interest, and neither its rate nor the time from which it ran is specified, the claim for interest may be disregarded in fixing the amount of the bond.[6] It will be good for the amount, but not for the interest.[7]

Under a statute which requires the bond to be double the amount of the demand, it was said that if the action is "debt" and the damages only nominal, the bond should be for double the amount of the debt only; but if the action is "*assumpsit*," and the damages are laid to cover interest, then the bond should be for double the amount of both the debt and damages.[8]

without affidavit and bond, as therein provided, shall be abated on motion of the defendant. East & West Texas Lumber Co. *v.* Warren, 14 S. W. Rep. 783, 78 Tex. 318.

1. Bourne *v.* Hocker, 11 B. Mon. (Ky.) 23; Strong *v.* Lake Wier C. & L. Ass'n, 25 Fla. 765, 6 So. Rep. 882.

2. Gallagher *v.* Cogswell, 11 Fla. 127.

3. McDaniel *v.* Sappington, Hard. (Ky.) 94.

4. Graham *v.* Burckhalter, 2 La. Ann. 415; Planters' Bank *v.* Byrne, 3 La. Ann. 687.

Subsequent proceedings because of an insufficient bond are not affected by the fact that the amount of an attachment bond was fixed by an order of a judge, granting the attachment. Fleitas *v.* Cockrem, 101 U. S. 301.

5. Erwin *v.* Commercial Bank, 12 Rob. (La.) 227.

6. Planters' Bank *v.* Byrne, 3 La. Ann. 687; Pope *v.* Hunter, 13 La. 306.

7. Fellows *v.* Dickens, 5 La. Ann. 131.

8. Brown *v.* Whiteford, 4 Rich. L. (S. C.) 327.

When to cover costs. Where an at-

§ 165. (b) **Application of the rule de minimis non curat lex.**—In a state where a defect in the amount named in the bond can not be cured by subsequently furnishing a bond in a sufficient amount,[1] it was held that when the bond is only defective in being less than one dollar under the amount it should have been, the rule *de minimis non curat lex* applies.[2] But where the bond given by the plaintiff, though for $5,000, yet lacked $57 of the amount it should have named, it was held that he could not invoke the rule *de minimis*, and the attachment must be set aside.[3]

§ 166. (c) **Order of court to increase the amount.**—In Kansas, where a defect in the undertaking is not fatal unless the plaintiff refuses to furnish a sufficient one within such time as the court may direct, it has been held that if the defendant thinks the penalty too small his remedy is to apply to the court to order increased security; and not to move to vacate the attachment.[4]

§ 167. **Parties to the bond—Generally—(a) Obligors.**—The purpose of the undertaking being to bind the plaintiff in the attachment to indemnify the defendant for any damage he may sustain by the wrongful issuing of the writ, it is self-evident that the plaintiff in the action and his sureties should be named as the obligors, and that the defendant or defendants should be named as obligees in the bond. This will lay a proper foundation for a subsequent action on the bond, should damage result to the defendant from the attachment. Confusion and miscarriage of justice will be avoided by proper recital in the bond of the names of the parties in the suit. It has been well said that the declaration, the affidavit, the bond,

tachment is not original, but is issued in aid of a pending action, the costs of such action do not come within the obligation of the attachment bond. Packer *v.* Phillips, 33 Ill. App. 120.

1. Graham *v.* Burckhalter, 2 La. Ann. 415; Planter's Bank *v.* Byrne, 3 La. Ann. 687.

2. Bodet *v.* Nibourel, 25 La. Ann. 499.

3. Yale *v.* Cole, 31 La. Ann. 687.

4. Gapen *v.* Stephenson, 18 Kan. 140. See further as to "Amendment," *post*, § 179.

the writ, the judgment and the execution must not vary in the description of the parties.[1] And as a general proposition this is true. The exceptions to the rule will be made presently to appear.

§ 168. (b) **Obligees.**—The attachment bond should be made for the benefit of the party against whom the writ is to be issued.[2] In general, the covenant in the bond runs directly to the defendant, though it is said in California that the undertaking may well be to the state, and that it will then inure to the benefit of the defendant,[3] and in Pennsylvania it must be payable to the commonwealth for the use of the defendant.[4] But in Maryland, though the statutes prescribe that a bond shall be made payable to the state, yet where it is erroneously made payable to defendant he can maintain a suit thereupon if the attachment is dismissed.[5]

If there is only one defendant against whom the debt is alleged, and on whose property alone an attachment is sought, the bond should be made payable to him alone.[6] Therefore, when a seizure of the property of one member of a firm only is sought, a bond payable to the firm will not be good.[7]

The general rule is that the defendant can alone sue on the bond, but where the attachment is made to issue against specific property, the defendant in the attachment, or the owner of such specific property, can sue on the bond.[8] In any event the benefits of the covenants of the bond do not inure to third persons.[9] And a condition to pay all damages "sustained by any person by reason of their suing out said order of attachment" will not inure to the benefit of the sheriff who levied the attachment.[10] The bond inures to the benefit of each and every defendant

1. Bennett *v.* Zabriski, 2 N. Mex. 176.

2. Courrier *v.* Cleghorn, 3 Greene (Iowa) 523.

3. Taaffe *v.* Rosenthal, 7 Cal. 514.

4. Wallace, Elliott & Co. *v.* Plukart, 6 Pa. Co. Ct. 151.

5. McLuckie *v.* Williams, 68 Md. 262, 12 Atl. Rep. 1.

6. Branshaw *v.* Tinsley, 23 S. W. Rep. 184, 4 Tex. Civ. App. 131.

7. Courrier *v.* Cleghorn, 3 Greene (Iowa) 523.

8. Davis *v.* Commonwealth, 13 Gratt. (Va.) 139. See further as to "Action on the Bond," *post*, § 182.

9. Edwards *v.* Turner, 6 Rob. (La.) 382.

10. Mitchell *v.* Chancellor, 14 W. Va. 22.

aggrieved by the suing out of the attachment. If they have a common interest, as in a case of partners, the benefits will accrue to all of them. On the other hand, if but one of several defendants is in fact injured, it is equally clear that he alone can recover.[1] Such obligees as may be damaged may recover on the covenants without joining the others.[2] And where an attachment bond is executed to several obligees, with a condition to pay them such damages as they may sustain because of the wrongful suing out of the attachment, then all the obligees may join in an action on the bond, although the attachment was levied on the individual property of only one of them.[3]

Where a suit is brought against a firm in the firm name, without naming the individual members thereof, a bond made payable to the individuals composing the firm without naming the firm is void.[4]

§ 169. (c) **Plaintiff executing the bond as principal obligor.** —While it is manifestly proper that the plaintiff in the action should execute the bond as the principal obligor, yet if the bond be signed by sufficient sureties alone, it will generally be good without the signature of the plaintiff in the action.[5] A good and sufficient bond executed by others, payable to the defendant and approved by the clerk, will be sufficient to sustain the attachment, although it be not signed by the plaintiff.[6]

1. Renkert *v.* Elliott, 11 Lea (Tenn.) 235; Hadley *v.* Bryars, 58 Ala. 139; Voorheis *v.* Eiting, (Ky.) 22 S. W. Rep. 80.

2. Alexander *v.* Jacoby, 23 Ohio State 358.

3. Sloan *v.* Langert, 6 Wash. 26, 32 Pac. Rep. 1015; Boyd *v.* Martin, 10 Ala. 700. See further as to "Action on the Bond," *post*, § 182.

4. Birdsong *v.* McLaren, 8 Ga. 521.

5. Taylor *v.* Ricards, 9 Ark. 378; Howard *v.* Manderfield, 31 Minn. 337; Eckman *v.* Hammond, 27 Neb. 611, 43 N. W. Rep. 397.

6. Mandel *v.* Peet, 18 Ark. 236; see *ante*, § 159.

But the words "on the part of the plaintiff," as used in the South Carolina code, which provides that the officer, before issuing the attachment, "shall require a written undertaking on the part of the plaintiff, with sufficient surety," mean that the obligation must be executed by the plaintiff, or his authorized agent, and a bond executed by a third person that the *plaintiff* will pay, is insufficient. It must be the bond of the individual. National Exchange Bank *v.* Stelling, 31 S. C. 360, 9 S. E. Rep. 1028.

The sureties, by executing the bond, and the plaintiff, by invoking the writ only, all become liable to actual damages occasioned by the wrongful issuing of the writ.[1] But if a bond be given by an entire stranger, no action can be sustained thereon.[2]

§ 170. (d) **Agent or attorney executing the bond in plaintiff's name as principal obligor.**—When the plaintiff in the attachment suit is not absent, he should always sign the bond in person. In fact, under the South Carolina act of 1799 no other person was authorized to execute the bond.[3] It may now be executed by an agent "on the part of the plaintiff."[4] And in Virginia in 1796 it was said that the bond ought to be given by the plaintiff himself.[5] But later it was said that where the bond was signed by the plaintiff by his attorney in fact, it would not be dissolved on motion; that if he had no authority the lack of it could only be questioned by plea in abatement.[6] The rule has since so far relaxed as to permit us to say that in general it is not necessary that the plaintiff sign the bond. It may be signed by his agent or attorney describing himself as such or not.[7]

However, in Florida a power of attorney, under seal, is required to authorize an agent to execute a bond in the name of the principal.[8] And in Louisiana the power of the agent to sign the bond must be special;[9] and where no authority is shown, other than that he was the attorney for the plaintiff in another state, the attachment will be dismissed.[10] But again it

1. State *v.* Fortinberry, 54 Miss. 316.
A board of supervisors can give a bond and sue in attachment on behalf of a county. State *v.* Fortinberry, 54 Miss. 316. And the bond may be good, even though it does not bind the county. State *v.* Fortinberry, 54 Miss. 316.

2. See *ante*, § 159, "Signing the Bond."

3. Myers *v.* Lewis, 1 McMull Law (S. C.) 54.

4. National Exchange Bank *v.* Stelling, 31 S. C. 360, 9 S. E. Rep. 1028.

5. Mantz *v.* Hendley, 2 Hen. & Munf. (Va.) 308.

6. Tingle *v.* Brison, 14 W. Va. 295.

7. Messner *v.* Lewis, 20 Tex. 221.

8. Forbes *v.* Porter, 25 Fla. 362, 6 So. Rep. 62.

9. Grove *v.* Harvey, 12 Rob. (La.) 221.

10. Wetmore *v.* Daffin, 5 La. Ann. 496.

is said that the attorney is presumed to be the *attorney in fact* for the collection of the debt, and that a ratification of the authority is tantamount to original authority.[1] And that after having received the service of an attorney for a number of years in other matters, the authority of the attorney to bring attachment and give a bond therefor can not be denied by the client.[2] And again that silence for eight years is a ratification of the authority of the attorney.[3]

In Mississippi it was early said that the authority of the agent to sign the bond need not accompany the bond, and that it would be presumed that the authority was shown to the officer who granted the writ.[4] Later it was said that a bond by the agent of the plaintiff complies with the requirements of the statute as substantially as if it had been given by the plaintiff himself.[5] And now the rule is that a bond valid on its face is sufficient, because the court can not look beyond the facts of the bond for the authority of the party who executed it.[6]

In Maine, though a bond may be executed by an attorney who has no authority so to do, it may be rendered valid by a subsequent ratification, and the prosecution of the suit thus begun will be such a ratification.[7] A judge of the United States Circuit Court sitting in Maine has said that the plaintiff's attorney has implied authority to do all acts which the interests of his client may require.[8]

The general rule may be said to be that where the name of the plaintiff in the suit is signed to the bond by his attorney or agent, it will be presumed in the appellate court (no showing having been made to the contrary in the court below) that it was made to appear to the lower court that he had authority to

1. Trowbridge *v.* Weir, 6 La. Ann. 706.
2. Mason *v.* Stewart, 6 La. Ann. 736.
3. Brooks *v.* Poirier, 10 La. Ann. 512.
4. Lindner *v.* Aaron, (Miss.) 5 How. 581.
5. Frost *v.* Cook, 8 Miss. (7 How.) 357.
6. Spear *v.* King, 6 Smedes & M. (Miss.) 276.
7. Narraguagus *v.* Wentworth, 36 Me. 339.
8. Pierce *v.* Strickland, 2 Story (U. S.) 292.

sign.[1] And that when a non-resident plaintiff's attorney executes a bond in attachment, it will be presumed that he did not transcend his authority.[2]

When the bond has been executed by one as agent for the plaintiff, it is always competent for the defendant to deny the right of the agent to execute it.[3] And if the undertaking has been executed by the agent without authority it will be quashed.[4] The objection to the execution of the bond by the agent, because of lack of authority so to do, should, it seems, be raised by plea in abatement and not by motion to quash.[5] For on motion to quash, everything on the face of the bond will be taken as true, including the admission of the authority of the agent or attorney to execute it.[6] The averment of the defendant that the bond has been executed without authority is negatived by the appearance and prosecution of the suit by the plaintiff.[7] If the bond is in due form and the principal appears and prosecutes the action sued out by the agent for his benefit, it is a recognition of the authority of the agent to begin the suit and execute the bond.[8]

Where an agent signs a bond "for J. H., J. R. & J. W." it will be sufficient, although only one seal is affixed; and it can not be construed to be the individual bond of the agent.[9]

When one person executes a bond "for the purpose of" another, the usee is the real principal.[10]

1. Goddard *v.* Cunningham, 6 Ia. 400; Lindner *v.* Aaron, 5 How. (Miss.) 581.

2. Schoregge *v.* Gordon, 29 Minn. 367.

But in some states a bond in the name of the plaintiff, signed by his attorney in the case, will be defective where there is no apparent authority. Harrisburg Boot and Shoe Co. *v.* Johnson, (Pa. Com. Pl.) 3 Pa. Dist. R. 433.

3. Dove *v.* Martin, 23 Miss. 588.

4. Peiser *v.* Cushman, 13 Tex. 390.

A bond signed by the plaintiff's attorney without authority will not in Missouri be a nullity where signed by sureties. On motion to quash the attachment another bond may be filed. Whitman Agricultural Ass'n *v.* National Ry. E. & I. Ass'n, 45 Mo. App. 90.

5 Messner *v.* Hutchins, 17 Tex. 597; Alford *v.* Johnson, 9 Porter 320; Tingle *v.* Brison, 14 W. Va. 295.

6. Wright *v.* Smith, 19 Tex. 297.

7. Dove *v.* Martin, 23 Miss. 588.

8. Bank of Augusta *v.* Conrey, 28 Miss. 667.

9. Martin *v.* Dortch, 1 Stew. (Ala.) 479.

10. Grand Gulf R., etc., Co. *v.* Conger, 9 Smedes & M. (Miss.) 505.

§ 171. (e) **Agent or attorney executing an individual bond as principal obligor.**—A bond by an agent in his character as agent, in which he professes to bind himself and not his principal, is a sufficient compliance with the statute generally; provided it also have sufficient sureties.[1] And a bond by an attorney at law in his own name, binding himself and not his principal, will be good if signed by two sufficient sureties.[2] A person who voluntarily gives a bond need not produce a special power of attorney to bind himself, and an attorney authorized to bring an action may give his own bond, styling himself as agent, and this will justify the clerk in signing the writ, if the sureties be sufficient.[3]

It may be well to call attention to the fact that, although the sufficiency of the sureties may be a matter left with the clerk, yet the legal validity of the bond is a subject of review.[4]

An officer of a municipal corporation may execute his personal bond in a suit in attachment in behalf of such municipal corporation. A board of supervisors can give an attachment bond for their county; and a bond executed by individual members of the board as sureties may be good even though it may not bind the county. And a bond in the name of the board, by its retained attorney, will be sufficient if authorized or ratified and adopted by an order on the minutes, provided, of course, that there be sufficient sureties on such bond.[5] Where an attachment suit was begun in behalf of the trustees of a town, and one of the trustees executed the bond in his individual name purporting to bind himself personally, but containing the condition that suit would be prosecuted by the trustees, the bond was held to be sufficient to sustain the attachment.[6]

1. Conklin *v.* Goldsmith, 5 Fla. 280; Stewart *v.* Katz, 30 Md. 334; Page *v.* Ford, 10 Miss. (2 Smedes & M.) 266.

2. Simpson *v.* Knight, 12 Fla. 144; Wood *v.* Squires, 28 Mo. 528; Beardslee *v.* Morgan, 29 Mo. 471; Henderson *v.* Drace, 30 Mo. 358.

But the execution of a bond by the party who made the affidavit as agent and who is not so designated in the bond, it seems, is void and not subject to amendment. Work *v.* Titus, 12 Fla. 628.

3. Dillon *v.* Watkins, 2 Speers (S. C.) 445.

4. Stewart *v.* Katz, 30 Md. 334.

5. State *v.* Fortinberry, 54 Miss. 316.

6. Clanton *v.* Laird, 20 Miss. (12 Smedes & M.) 568.

§ 172. (f) **Use of partnership name in executing the bond.** —The rule in Florida is stated to be that where a bond of attachment by a copartnership is signed and sealed in the firm name by one member of the firm, who has been authorized by parol, or whose action is ratified by parol by the other, the bond will be good as to both.[1] Georgia says that if one member of a partnership sign the partnership name as surety, when the other is present and consents and afterward ratifies the act under seal, the court will be "strongly inclined to the opinion that it is good;" and further that the partner is entitled to amend, though the bond were already binding upon him.[2] Iowa states that, although it is not proper that the attachment bond should be given by sureties in the firm name, yet where the sureties of the bond thereafter prosecute the suit, as the attorneys for the plaintiff, the attachment would not be dissolved, although the bond was signed by the sureties in the partnership name.[3] And again, where a bond for attachment was signed by the principal and sureties in their partnership name, it was said to be sufficient.[4] Texas avers that where the bond is given in the partnership name, it will be presumed that the officer who took the bond satisfied himself that the principal who signed the firm name had authority so to do;[5] that it is no objection to the bond that the individual members are described in the bond, and that it is signed in the firm name;[6] that a partnership may sign as principal in the firm name, and furthermore, that the name of the business firm signed to the bond by an agent will support attachment.[7] And that if the suit be brought against a firm in the firm name, a bond made payable to the firm in its partnership name will be good.[8] Missouri says the principal obligors may sign the bond in the partnership name merely.[9] Mississippi permits one member of the

1. Jeffreys *v.* Coleman, 20 Fla. 536.
2. Cunningham *v.* Lamar, 51 Ga. 574. See, also, Dow *v.* Smith, 8 Ga. 551.
3. Danforth *v.* Carter, 1 Iowa 546.
4. Churchill *v.* Fulliam, 8 Iowa 45.
5. Donnelly *v.* Elser, 69 Tex. 282, 6 S. W. Rep. 563.
6. Gray *v.* Steedman, 63 Tex. 95.
7. Munzesheimer *v.* Heinze, 74 Tex. 254, 11 S. W. Rep. 1094.
8. De Caussey *v.* Baily, 57 Tex. 665.
9. Claflin *v.* Hoover, 20 Mo. App. 314.

firm who brings an action for the firm to execute a bond by himself alone and thereby bind the firm.[1] Virginia has permitted one member of a mercantile house to make a bond conditioned that he and sureties would pay all costs, etc., that may be adjudged to "him," and to support an attachment thereon in behalf of the firm.[2] But on the contrary it has been said that a bond given by F, one of the members of a firm, with sureties, reciting that F has obtained an attachment on condition that if "he" shall be cast in the suit, "he" shall pay all damages which shall be recovered against "him," was void and would not support attachment.[3] Maryland has said that where the firm name was signed, and it was not made to appear by whom it had been signed, that the firm name might be treated as surplusage, the sureties to the bond held, and the attachment sustained.[4] While in Illinois, in an attachment sued out by one person "for the use of" two others in their firm name on the bond by one of the firm and sufficient sureties, containing proper recitals concerning the recovery of the judgment, was deemed to be sufficient.[5]

§ 173. (g) **The sureties on the bond—Generally.**—For the better indemnification of the defendant in the attachment against any loss which he may sustain because of the wrongful suing out of the writ, all states require that the undertaking shall be, in addition to the undertaking of the plaintiff, also the undertaking of sufficient surety or sureties. An attachment begun without surety is generally void, and the proceedings will be set aside.[6]

1. Wallis *v.* Wallace, 6 How. (Miss.) 254.

2. Kyle *v.* Connelly, 3 Leigh (Va.) 719.

3. Jones *v.* Anderson, 7 Leigh (Va.) 308.

4. Gable *v.* Brooks, 48 Md. 108.

5. Love *v.* Fairfield, 10 Ill. 303.

6. Ford *v.* Rogers, 12 Rich. Law (S. C.) 385.

Under the Pennsylvania statute relating to attachment by justices of the peace, providing that before an attachment shall issue the plaintiff, or some one in his behalf, shall execute a bond with good and sufficient sureties, a bond with more than one surety is necessary, and a bond, deficient in that respect, can not be amended at the trial by adding another surety. Spettigue *v.* Hutton, (Pa. Com. Pl.) 9 Pa. Co. Ct. Rep. 156. As to General Attachment Bond, see § 72, code of 1883.

The undertaking is an original independent contract on the part of the sureties, and must be construed in connection with the statute which authorizes it.[1] The surety is no party to the original action.[2] The statute usually prescribes the character of the party who will be a sufficient surety as, that he shall be a "freeholder," a householder, etc. It sometimes requires that they be two or more in number, and sometimes the word "sureties" only is used in the plural form. Under the construction of the Iowa statute requiring "sureties," one single surety will satisfy the statute if he be otherwise good and sufficient.[3] And though a bond executed by the principal and one surety is generally defective, it may usually be amended.[4] It is such defect as will be waived by appearance and answer.[5] Nor will it be fatal to the judgment in attachment in a collateral suit on the claimant's bond.[6]

It seems not to be necessary to the fixing of the liability of the surety that his name should be recited in the body of the undertaking.[7] Nor is it necessary that their signatures should be beneath the written conditions, for no valid objection can be made because of the fact, when their "signs"[8] and seals are placed above the conditions.[9]

§ 174. (h) **Who may be a surety on the bond.**—In some states certain classes of persons, such as attorneys and coun-

In Missouri a bond executed by the plaintiff alone, with no sureties, is not a nullity. An application should be made for a better bond in pursuance of the statute. Jasper County *v.* Chenault, 38 Mo. 357. See further as to "Amendment," *post*, § 179.

In Texas the statute prohibits attorneys from becoming sureties, but though a bond be thus signed as sureties in violation of the statute, it will not render the attachment void. Rogers *v.* Burbridge, 24 S.W.Rep. 300, 5 Tex. Civ. App. 67.

1. Frankel *v.* Stern, 44 Cal. 168.
2. Baker *v.* Doane, 3 La. Ann. 434.
3. Elliott *v.* Stevens, 10 Iowa 418.
4. McDonald *v.* Fist, 53 Mo. 343.
5. Bryant *v.* Hendee, 40 Mich. 543.
6. Atkinson *v.* Foxworth, 53 Miss. 741.

The fact that the attachment was illegally issued will not exempt the surety from liability. Shevlin *v.* Whelen, 41 Wis. 88; Zechman *v.* Haak, 56 N. W. Rep. 158, 85 Wis. 656.

7. McLain *v.* Simington, 37 Ohio St. 484, explaining Stevens *v.* Allmen, 19 Ohio State 485.
8. This word is used in the case and I retain it.—AUTHOR.
9. Melvin *v.* Steamboat General Shields, 15 Ark. 207.

selors at law, may not become surety on an attachment bond for their clients, but when an attorney and counselor at law is not employed as an attorney in the attachment case, he may become a surety on the bond, although he acted as an attorney in the original common-law suit.[1] And in Maryland the fact that he is an attorney of the court does not incapacitate him from becoming a surety on an attachment bond.[2] If the clerk, whose duty it is to approve the bond, allows an attorney at law to become surety on an attachment bond, in violation of the direction of the statute, the surety will nevertheless be bound.[3] In Florida a person who has signed an attachment bond as agent for the plaintiff can not sign it as surety.[4]

The place of residence of the surety must be such that he will be within the jurisdiction of the court in the event of an action being thereafter brought against him on the undertaking. They are uniformly required to be residents of the state.[5] And in Louisiana, if the surety does not reside in the jurisdiction of the court which grants the writ, the bond will be void and can not be afterwards cured by substituting a sufficient surety. The attachment on such bond will fail.[6] If the surety remove from the jurisdiction of the court another bond must be given with surety within its jurisdiction.[7]

A stockholder may be a surety on an attachment bond of the incorporated company of which he is a member.[8] And an officer of a municipal corporation may become surety on an attachment bond for such municipal corporation.[9]

§ 175. (i) **Surety must be sufficient.**—It is evident that the defendant will not be secured against damage by the wrongful

1. Burton *v.* Wynne, 55 Ga. 615.
But in Georgia, if he were acting attorney, it would not make the proceeding void. The defects would be amendable. Burton *v.* Wynne, 55 Ga. 615.
2. Lewis *v.* Higgins, 52 Md. 614.
3. Tessier *v.* Crowley, 17 Neb. 207.
4. Marshall *v.* Ravisies, 22 Fla. 583.
5. But surety need not be a resident of the county. Mobile M. Ins. Co. *v.* Cleveland, 76 Ala. 321.
6. Bres *v.* Booth, 1 La. Ann. 307; McCook *v.* Willis, 28 La. Ann. 448.
7. Foxworth *v.* Burckhalter, 3 La. Ann. 365.
8. City Nat. Bank *v.* Cupp, 59 Tex. 268.
9. See *supra*.

issuing of the writ unless a *recovery* can be had upon the undertaking. The security must be *good*. The statute prescribing the amount for which the bond shall be taken contemplates, not only that the bond shall be for that amount, but that the security shall be good for the like amount.[1] In one case it has been held, under a statute requiring a bond for double the amount of the demand, that each surety justifying to the amount of the demand constituted a bond for double the amount of the demand.[2] When the defendant is dissatisfied with the surety on the bond he should at once raise the objection, and if the court is convinced of the insufficiency of the surety it will order further security or an amended bond, if the defect be amendable; but it seems that in Louisiana, if it is made to appear that the surety is not worth the full amount of the bond, the attachment will be set aside.[3]

The verification of a bond in California that A B, "each being duly sworn, * * * says that they are worth, etc., over and above his," etc., though irregular, complies with the statutory requirements that each shall be worth, etc.[4]

It seems that if the sureties become insolvent after the execution of the bond the court has no power to compel the plaintiff to give additional sureties.[5]

The extent of the liability of the surety will be considered in a subsequent section on "Action on the bond."[6]

§ 176. **Approval of the bond by the clerk.**—It is the general duty of the clerk of the court in issuing a bond of attachment to see that it is sufficient, and if it is, to approve of the same;

1. Lockett *v.* De Neufville, 55 Ga. 454.

2. May *v.* Gamble, 14 Fla. 467.

3. Jackson *v.* Warwick, 17 La. 436.

And the supreme court has no power to order the substitution of a sufficient surety for an insufficient one on the bond. Durham *v.* Lisso, 32 La. Ann. 415.

4. Taaffe *v.* Rosenthal, 7 Cal. 514; as to construction see *ante*, § 160.

5. Proskey *v.* West, (Miss.) 8 Smed. & M. 711.

If a constructive attachment of shares of corporate stock has been made, and they thereafter become depreciated in market value, the defendant is not entitled to have the attachment undertaking increased for this reason, such depreciation not being attributable to the attachment. Miller *v.* Ferry, 2 N. Y. S. 863.

6. *Post*, § 182.

but his approval of the bond is not conclusive of the sufficiency thereof. It is only *prima facie* evidence of the fact.[1] But the memoranda and acceptance of the bond need not be made, indorsed and signed by him. The fact that the clerk issues the writ upon the filing of the bond is of itself a sufficient approval of the bond, so far as the defendant is concerned.[2] The obligors on the bond become liable by the execution and delivery of it to the clerk, who receives and files the same. And if the fact that it has been received and filed by him is averred in an action on the bond, it will be sufficient without an averment that he approved the bond.[3] When the indorsement of the approval of the clerk was deemed necessary, and the same had been omitted, it was allowed by the court to indorse the same at any time.[4] The clerk having indorsed his approval, he can not afterwards be heard to contradict it by testimony.[5]

1. Blaney *v.* Findley, 2 Blackf. (Ind.) 338.

The same is true of a bond taken by a sheriff and filed. State for Use of Young *v.* Hesselmeyer, 34 Mo. 76.

In Minnesota an attachment bond is invalid when the writ is issued by a clerk of the court without a preliminary allowance by the judge or court commissioner. Jacoby *v.* Drew, 11 Minn. 408.

The issuance of a writ is a judicial act which, under the constitution of the state, a clerk of the district court can not be delegated to perform. Morrison *v.* Lovejoy, 6 Minn. 183; Guerin *v.* Hunt, 8 Minn. 477.

As to approval in Georgia, see Clay *v.* Tapp Leather Co., 79 Ga. 596, 7 S. E. Rep. 256; Enneking *v.* Clay, 79 Ga. 598, 7 S. E. Rep. 257; Bailey *v.* Clay, 7 S. E. Rep. 258.

2. Hyde *v.* Adams, 80 Ala. 111; West *v.* Woolfolk, 21 Fla. 189; Levi *v.* Darling, 28 Ind. 497; Howard *v.* Oppenheimer, 25 Md. 350; Griffith *v.* Robinson, 19 Tex. 219; Whitman Agricultural Ass'n *v.* National Ry. E. & I. Ass'n, 45 Mo. App. 90.

In Georgia the bond need not be given in the presence of, nor approved by, the magistrate who issues the writ. Smith *v.* Joiner, 27 Ga. 65.

Nor need it be attested by the magistrate who issues the writ. If it is duly executed it will be sufficient, though attested by another magistrate and the magistrate who issued the process certifies therein that the bond and security were given in pursuance of the statute. Brown *v.* Clayton, 12 Ga. 564; Dobbs *v.* Justices, etc., 17 Ga. 624.

Under the Colorado statute, providing that no writ shall be invalid by reason of any informality or insufficiency in the execution of the bond, if the bond is unapproved by the clerk, and without justification by the sureties, the writ is voidable only. Jones *v.* Bank of Leadville, 10 Colo. 464, 17 Pac. Rep. 272.

3. Dothard *v.* Sheid, 69 Ala. 135. See *post*, § 182, "Action on the Bond."

4. Anderson *v.* Kanawha Coal Co., 12 W. Va. 526; Mandel *v.* Peet, 18 Ark. 236.

5. Pearson *v.* Gayle, 11 Ala. 278.

When the statute relating to the issuance of an attachment on a debt not due vests the sole power to issue the same in the judge of the court in which the action is pending, or the presiding judge of the county court or any circuit judge, an attachment issued by the clerk is absolutely void.[1]

Where the clerk is himself the plaintiff in the attachment suit, his bond, approved by his own deputy, is a nullity. The filing of a new and sufficient bond by him will not avail.[2]

It seems that if the sureties become insolvent after the execution of a bond, the court has no power to compel the plaintiff to give additional sureties. The presumption is that the officer did his duty in requiring sufficient surety at the time of the filing of the bond.[3]

The sureties will not be heard to complain because of the bond not having been approved. Such irregularity can only prejudice the plaintiff.[4]

§ 177. **Failure to give sufficient bond, who, how and when to object because thereof.**—There is no authority to be found in the books for quashing the proceedings on the motion of a mere stranger to the record, but it is said that a *privy* in interest may point out defects in the proceeding at all times.[5] When no bond is filed in the suing out of the attachment, the defendant is generally the only person who can take advantage thereof, whether the same render the proceeding absolutely void or be considered a mere irregularity susceptible of amendment.[6]

The court has permitted objection to the attachment proceedings for want of the bond to be brought before it on motion to

1. Kleine *v.* Nie, 88 Ky. 542, 11 S. W. Rep. 590.

2. Owens *v.* Johns, 59 Mo. 89.

3. Proskey *v.* West, 8 Smedes & M. (Miss.) 711.

Nor in Louisiana, when it is shown on the trial that a sequestration legally issued, is the party obtaining it liable in damages on account of the surety, whom the judge has approved, being subsequently ascertained not to be worth the amount of the bond. Isaacson *v.* Wall, 22 La. Ann. 243.

4. Bennett *v.* Mulry, (Super. N. Y.) 26 N. Y. S. 790, 6 Misc. Rep. 304.

5. Planters, etc., Bank *v.* Andrews, 8 Porter (Ala.) 404.

6. O'Farrell *v.* Stockman, 19 Ohio State 296; Camberford *v.* Hall, 3 McCord (S. C.) 345; Austin *v.* Goodbar Shoe Co., 60 Ark. 444, 30 S. W. Rep. 888.

quash,[1] and once it was said to be the only remedy in such case.[2] Where the defect is amendable, it would seem that such motion, after proper notice having been given, is the proper practice. On such a motion being made, the court will enter an order requiring a sufficient bond to be furnished within a certain time or the attachment dismissed.[3] But by the strict rules of pleading, any matter which defeats the present proceeding and does not show that the plaintiff is forever precluded, should, in general, be pleaded in abatement.[4] Following this principle, many courts hold that while the lack of a bond will have the effect of abating the writ, yet it is no ground for motion to dissolve the attachment and restore the property. The defendant must appear and plead to the action before his exception will be entertained by the court, and such exception to the proceeding must be taken by plea in abatement.[5] A failure to file a bond is no ground for demurrer to the cause of action.[6] But such failure to give a bond being a jurisdictional matter, and the giving of a bond a matter that should appear of record, it has been held that its absence could be taken advantage of on appeal or error,[7] although it is said that defects are not available on error unless exception has been taken by plea in abatement.[8]

Whether the objection for want of a proper bond be raised by plea in abatement or by motion to quash, it must be taken advantage of at the beginning; for after appearance and a plea to the merits, it will generally be too late to take advantage of defects in the preliminary proceedings; such appearance being

1. Myers *v.* Lewin, 1 McMullen Law (S. C.) 54.

2. Kelly *v.* McCormick, 2 E. D. Smith (N. Y.) 503.

3. Jasper County *v.* Cheanult, 38 Mo. 357; Lockett *v.* Neufville, 55 Ga. 454.

In an attachment in chancery, the lack of a bond being an amendable defect, it has been said the objection should be by motion to amend in the lower court. Bank of Alabama *v.* Fitzpatrick, 4 Humph. (Tenn.) 311.

4. 4 Term Rep. 227, 3 Chitty's Blacks. 302.

5. Didier *v.* Galloway, 3 Ark. 501; Steamboat Napoleon *v.* Etter, 6 Ark. 103; Mandel *v.* Peet, 18 Ark. 236; Alford *v.* Johnson, 9 Porter (Ala.) 320.

6. Alexander *v.* Pardue, 30 Ark. 359.

7. Henrie *v.* Sweasey, 5 Blackf. (Ind.) 273.

8. Burt *v.* Parish, 9 Ala. 211.

deemed a waiver of defects.[1] In Mississippi alone it is held that the appearance of the defendant and his pleading to the action,[2] or even the entry of judgment,[3] does not cure the absence of a bond; the entire proceeding being void. The objection to the proceeding, for want of a proper bond or undertaking, must be made in the primary court, in order that the plaintiff may have an opportunity to file a sufficient bond where the defect is amendable.[4] Even in a case where the record did not show that the defendant had any notice whatever of the pendency of the attachment, it was held the objection, for want of a bond, could not be made in the court above.[5] To make no objection during the attachment proceedings to the absence of the bond, but to plead in abatement in an action afterwards brought on the bond, will be bad.[6]

§ 178. **Waiver of objection to insufficiency of bond.**—The same rule, as to waiver of objections to irregularities and insufficiencies of the bond, maintains as to defects in the affidavit.[7] The objection must be taken *in limine*, for if it is not taken in the beginning the objection will be deemed to have been waived. As shown above the objection should be raised by plea in abatement, or motion to quash, and this before appearing and pleading to the merits, or entering upon the trial of the case; for by pleading to the merits, the defendant waives his objections to the bond[8] in every state except Mississippi, where the want of a proper bond is a jurisdictional defect that can not be waived.[9]

1. Bryant *v.* Hendee, 40 Mich. 543; Young *v.* Grey, Harper (S. C.) 38; Balt. & O. R. R. Co. *v.* Taylor, 81 Ind. 24. See next section.

2. Tyson *v.* Hamer, 2 How. (Miss.) 669.

3. Ford *v.* Woodward, 2 Smedes & M. (Miss.) 260.

4. Conklin *v.* Harris, 5 Ala. 213; Lawver *v.* Langhans, 85 Ill. 138; Bretney *v.* Jones, 1 G. Greene (Iowa) 366.

5. Fleming *v.* Burge, 6 Ala. 373.

6. Sumpter *v.* Wilson, 1 Ind. 144.

7. See *ante*, § 152.

8. Young *v.* Grey, Harper (S. C.)38; Stoney *v.* McNeill, Harper (S. C.) 156; Callender *v.* Duncan, 2 Bailey (S. C.) 454; Ealer *v.* McAllister, 14 La. Ann. 821; Voorhees *v.* Hoagland, 6 Blackf. (Ind.) 232; Beecher *v.* James, 3 Ill. (2 Scam.) 462.

9. Tyson *v.* Hamer, 2 Howard (Miss.) 669; Houston *v.* Belcher, 12 Smedes & M. (Miss.) 514. See Clanton *v.* Laird, 12 Smedes & M. 568.

The rule regarding a *special* appearance is recognized in attachment cases, and an appearance for the sole purpose of moving to set aside the attachment is not a waiver of objections to the bond.[1]

§ 179. **Amendment of the bond.**—It seems to be the object of the attachment law to save the plaintiff from any injury resulting from mere formal defects in the papers which are prepared by others.[2] Consequently amendments to the bond, as well as to other papers in attachment, are allowed in certain cases and in certain states. In Mississippi when an insufficient bond is filed in the commencement of an attachment suit the proceedings will be rendered void. It can not be amended by the plaintiff, nor by the order of the court, nor waived by the parties defendant.[3] And in Kentucky it seems that the defect, of the bond not having been executed before the clerk, can not be cured by subsequent amendment.[4] In general, however, defects and irregularities in the bond may be subsequently cured by amendment.[5] In Michigan, if the bond given in an attachment be defective, a new bond may be filed, because an objection to the bond does not go to the jurisdiction of the court issuing the writ.[6] But in South Carolina where the undertaking, which the statute requires to be filed before writ can issue, is fatally defective as filed, the court is without jurisdiction, and can not amend the undertaking after the issuance of the writ.[7] But in Iowa it is said that no defective attachment bond shall prejudice the party giving the same; provided it be so rectified within such a reasonable time

1. Tiffany *v.* Lord, 65 N. Y. 310. See also as to "Affidavit," *ante*, § 152.

2. Miere *v.* Brush, 4 Ill. 21; Simmons Hardware Co. *v.* Alturas Com. Co., (Idaho) 39 Pac. Rep. 550; Standard Oil Co. *v.* Alturas Com. Co., (Idaho) 29 Pac. Rep. 550.

3. Houston *v.* Belcher, 20 Miss. (12 Smedes & M.) 514; Ford *v.* Hurd, 4 Smedes & M. (Miss.) 683; Page *v.* Ford, 2 Smedes & M. (Miss.) 266.

4. Horne *v.* Mitchell, 7 Bush (Ky.) 131.

5. Nutter *v.* Connett, 3 B. Mon. (Ky.) 199; Van Arsdale *v.* Krum, 9 Mo. 393; Beardslee *v.* Morgan, 29 Mo. 471; Lowry *v.* Stowe, 7 Porter (Ala.) 483.

An amended undertaking in attachment can not be filed *nunc pro tunc* with a justice of the peace in New York; he has no authority to grant such an amendment. Riley *v.* Skidmore, 6 N. Y. S. 107.

6. Adams *v.* Kellogg, 29 N. W. Rep. 679, 63 Mich. 105.

7. Wagener *v.* Booker, 31 S. C. 375, 9 S. E. Rep. 1055.

after discovery of the defect, as to cause no essential injury to the other party.[1] In Alabama, whether the bond be void or defective, the plaintiff will be allowed to substitute a new bond. In either case the rule is the same.[2] Georgia permits an amendment as to the matters of form.[3] And in California it is said that if a word is omitted by mistake, when, by looking to the whole undertaking and the statute, it can be ascertained what word was intended to have been inserted, the omitted word may be supplied and the contract read as if it had been so executed, without even first reforming it by supplying the omitted word.[4]

The bond is amendable by the insertion of a right name of a party or surety instead of a wrong one. Where the affidavit gives the name "Abraham" and the bond "Abram" the bond may be amended to conform to the affidavit.[5] And if the wrong name is inserted and there is no doubt of the identity of the person, the court will insert the true name; and subsequent proceedings in that name will bind the individual.[6] The bond may be signed in the partnership name, and if signed without authority the court may order a new bond to be given by the plaintiff.[7] And if the attachment is in the partnership name, and it has nowhere been made to appear who are the members composing the firm, the bond, as well as the affidavit and writ, may be amended by inserting the names of the individuals composing the firm.[8]

If seals have been omitted from the signatures of the obligors on the bond, the bond may be amended by affixing seals or scrolls.[9] But one of the obligors will not be allowed to so affix a seal to the name of another obligor.[10]

But in Florida and Alabama, when a bond with insufficient

1. Cheever *v.* Lane, 9 Iowa 193. In Iowa where a bond for an insufficient amount has been filed, the filing of a new and sufficient bond will cure the defect. Van Winkle *v.* Stevens, 9 Ia. 264.
2. Jackson *v.* Stanley, 2 Ala. 326.
3. Oliver *v.* Wilson, 29 Ga. 642.
4. Frankel *v.* Stern, 44 Cal. 168.
5. Alford *v.* Johnson, 9 Porter (Ala.) 320.
6. Adams *v.* Jacoway, 34 Ark. 542.
7. Claflin *v.* Hoover, 20 Mo. App. 314.
8. Sims *v.* Jacobson, 51 Ala. 186.
9. Lea *v.* Vail, 3 Ill. (2 Scam.) 473.
10. Hunter *v.* Ladd, 2 Ill. 551.

sureties has been filed, an amendment by giving additional security will not be allowed in attachment cases.[1]

The general rule regarding the amendment of an attachment bond is, that a defect therein is not a sufficient cause for quashing the attachment, unless the plaintiff declines or neglects to give a good and sufficient one when an opportunity is given him so to do.[2] The giving of notice as required by the statute, or by the practice, must be observed.[3] Then, if the plaintiff fails to file a good bond when required by order of the court upon proper notice and motion, the attachment will be dismissed.[4]

When a plaintiff sees that his bond is not sufficient he may, on his own motion, ask leave of the court to amend it, and he will be allowed to make such amendment or file such new bond as the statute may require.[5] He has a right to file another bond when the first is unavailing,[6] and not a nullity.[7]

§ 180. (a) **Effect of an amendment.**—If a defective attachment bond has been filed and approved, the subsequent filing and approval of a good bond by way of amendment causes the proceedings to become valid from the beginning.[8] Such bond will take the place of the original one and be treated as if it had been filed then.[9] The filing of the subsequent good bond, in place of the original defective bond, will support the attachment against an intervening sale of the property.[10]

1. Roulhac *v.* Rigby, 7 Fla. 336; Lowry *v.* Stowe, 7 Porter (Ala.) 483.

2. Planters, etc., Bank *v.* Andrews, 8 Porter (Ala.) 404; Lowe *v.* Derrick, 9 Porter (Ala.) 415; Scott *v.* Macy, 3 Ala. 250; Tevis *v.* Hughes, 10 Mo. 380; Van Arnsdale *v.* Krum, 9 Mo. 397; Cummings *v.* Denny, 6 Mo. App. 602.

3. Cummings *v.* Denny, 6 Mo. App. 602.

4. Jasper County *v.* Chenault, 38 Mo. 357.

5. Alexander *v.* Lisby, 2 Swan (Tenn.) 107; Kissam *v.* Marshall, 10 Abb. (N. Y.) Pr. 424; Pierse *v.* Miles, 5 Mont. 549; Wood *v.* Squires, 28 Mo. 528.

6. Beardslee *v.* Morgan, 29 Mo. 471; Henderson *v.* Drace, 30 Mo. 358.

7. McDonald *v.* Fist, 53 Mo. 343. See also *ex parte* Haralsom, 75 Ala. 543.

8. McCraw *v.* Welch, 2 Colo. 284; Bretney *v.* Jones, 1 G.Greene (Ia.) 366; Griffith *v.* Milwaukee Harvester Co., (Iowa) 61 N. W. Rep. 243.

9. State Bank *v.* Morris, 13 Iowa 136.

10. Bergman *v.* Sells, 39 Ark. 97.

§ 181. **Discharge of the bond.**[1]—The attachment bond is of course discharged by complying with the conditions which it recites. The payment of the judgment obtained on the demand, for the recovery of which the attachment was brought, and the costs taxed thereon, is the most direct manner in which the obligation may be discharged. The payment of the full amount of the penalty named in the bond will also discharge the bond.[2] In like manner the tender before judgment, in an action on the bond, of a sum sufficient to compensate the plaintiff for his damages will discharge the bond.[3]

Under the Rhode Island statute, an attachment bond is vacated by the death of the defendant before final judgment against him in the action in which the bond is given.[4]

A bond, conditioned that if the plaintiff "shall obtain judgment," etc., will not be satisfied and discharged by obtaining a judgment before a justice of the peace, if such judgment is afterward reversed.[5]

An attachment bond is not a negotiable instrument, yet an assignment of it transfers an equitable interest, and the interest of an assignee will be respected in a court of law. A person who is in the possession of such a bond assigned in blank, is, in law, *prima facie* the owner of it, and if the obligor make payment in good faith to such holder, the bond will thereby be discharged.[6]

1. The discharge of the attachment bond here mentioned must not be confounded with the bond for the discharge of the attachment hereinafter mentioned. See *post*, § 286.

2. And where the principal has paid the costs and damages, to the extent of the penalty of the undertaking, the sureties are discharged. Palmer *v.* Starbuck, (City Ct. N. Y.) 19 N. Y. S. 465.

3. In Louisiana a creditor necessarily releases the surety by seizing and selling the property under a privilege, but where a steamer was released on bond, seized and sold by another creditor, and her proceeds distributed, the sureties were not discharged by plaintiff's failure to assert his privilege in the distribution. He was not bound to resort to that fund and involve himself in a litigation, perhaps fruitless, and which the sureties had not themselves requested. Gordon *v.* Diggs, 9 La. Ann. 422.

4. Upham *v.* Dodge, 11 R. I. 621.

And a discharge of the principal in bankruptcy, before a judgment was obtained against him, operated to release the sureties on the attachment bond. Payne *v.* Able, 7 Bush (Ky.) 344.

5. Bennett *v.* Brown, 20 N. Y. 99.

6. Stoney *v.* McNeill, Harper (S. C.) 156.

§ 182. **Action on the bond—(a) "Debt," "covenant," "Trespass" or "case."**[1]—The bond in attachment is required for the protection of the defendant.[2] Therefore, if its conditions be broken, it is obvious that the defendant can procure redress to the extent of the penalty named in the bond, by resorting to an action on the bond.[3]

It is scarcely necessary to state that no action can ever be sustained on a void bond;[4] but this is not saying that no other form of action will lie against the principal for the same cause. Furthermore, the dissolution of an attachment does not preclude an investigation of the question in an action on the bond. Such dissolution is only *prima facie* evidence that it was rightfully dissolved.[5]

An action on an attachment bond is, of course, properly

1. No action is necessary in Washington, because the code provides that the bond indemnifying the defendant in an attachment proceeding "shall be part of the record, and, if judgment go against defendant, the same shall be entered against him and sureties." This authorizes judgment to be entered against the sureties without notice to them. Park *v.* Mighell, 3 Wash. 737, 29 Pac. Rep. 556.

Action on Foreign Bond. A bond given in attachment proceedings in another state, where it has been taken by a court having jurisdiction of the subject-matter, is good as a common law bond, and in an action upon it there is no necessity to set out any statute under which it was taken. Cunningham *v.* Jacobs, 120 Ind. 306; 22 N. E. Rep. 335.

2. *Ante*, § 153.

3. In Texas reconvention will not secure redress. The defendant in attachment must resort to an action on the bond. Shirley *v.* Byrnes, 34 Tex. 625.

The sheriff may be liable for trespass, or for negligence causing the loss of property, but this will not relieve the plaintiff if he does not prevail in his attachment. In such a case he and his sureties are liable for the value of the property. Hamilton *v.* Hurst, 5 La. Ann. 150.

Respecting the acquirement of jurisdiction of a non-resident principal in an attachment bond in an action brought thereon, it has been held in Georgia that a statute providing for service upon the surety does not deprive the principal of due process of law, because such principal, by voluntarily seeking the extraordinary statutory remedy of attachment in another state than that of his residence, *subjects himself* to the statutory liability implied thereby. Continental Nat. Bank *v.* Folsom, 78 Ga. 449, 3 S. E. Rep. 269.

4. Benedict *v.* Bray, 2 Cal. 251.

5. Sloan *v.* Langert, 6 Wash. 26, 32 Pac. Rep. 1015.

brought in the form of "debt," or it may be in the form of "case," and then it will be governed in all respects by the rules applicable to actions on the case for wrongfully suing out the attachment. Nevertheless the recovery will be limited to the penalty named in the bond.[1] Debt should be brought only for the recovery of damages suffered by the defendant in the attachment from being deprived of his property, its loss, destruction, deterioration with costs and expenses he has actually incurred in the attachment suit. For other damages he must resort to an action on the case.[2] The action of covenant will also lie in the first instance, and a recovery may be had for such damages as are properly recoverable in the common law action, and furthermore, for other damages on grounds contemplated by the statutes, and not embraced by the principles governing the actions on the case.[3]

When the attachment is wrongfully and *maliciously* sued out, the defendant is not confined to his remedy by an action on the bond, but may resort to the common law action on the case for the injury he has sustained,[4] and this before the attachment suit is determined.[5] Nor is it necessary for the obligee to first sue on the bond.[6] This action is in the nature of a common law action for malicious prosecution.[7] Both malice and the want of probable cause, in the original attachment, are essential to sustain this form of action. Malice alone, however great, is no ground for action if there was probable cause for the attachment proceeding.[8] The attachment must have been wrongful.[9] And no matter how malicious may have been the motives of the attachment plaintiff, this

1. Hill *v.* Rushing, 4 Ala. 212. See *post*, § 190.

Debt will not lie in North Carolina on a replevin bond given under the attachment law. The proper remedy is *scire facias*. Summers *v.* Parker, Term Rep. (N. C.) 147.

2. Bruce *v.* Coleman, 1 Handy (Cinti. Sup. Ct.) 515.

3. Smith *v.* Eakin, 2 Sneed (Tenn.) 456.

4. Sanders *v.* Hughes, 2 Brevard (S. C.) 495; Lexington and Ohio Ry. Co. *v.* Applegate, 8 Dana (Ky.) 289.

5. Donnell *v.* Jones, 13 Ala. 490.

6. Smith *v.* Story, 4 Humph. (Tenn.) 169.

7. See *post*, § 370, "Malicious Attachment."

8. Senecal *v.* Smith, 9 Rob. (La.) 418; Jackson *v.* Smith, 75 Ala. 97.

9. City Bank *v.* Jeffries, 73 Ala. 183.

action will not lie if he had probable cause for the issuance of the writ. "It is a well settled rule of law, founded on the principles of police and convenience, that the prosecutor shall be protected, though his private motives may have been malicious, provided he had a probable cause for the charge."[1] Where, however, the obligee has recovered damages in general for the plaintiffs having maliciously caused the attachment to be issued, he can not thereafter maintain an action on the bond to recover special damages, for having chosen to sue for malice, he is barred from his suit on the bond, because the former includes the latter.[2] But malice is not an essential element of an action on the case. It may be sustained for the *wrongful* suing out of the attachment only. The existence of malice is only important in connection with the amount of damages to be recovered.[3] The circuit court of the United States, sitting in Pennsylvania, has said that "trespass will lie for the malicious abuse of the writ of attachment;" that the party injured "should have his common law actions based specifically on the malicious intent."[4] But the general rule is, that trespass on the case and not trespass *vi et armis* is the proper form of action, and that "trespass" should not be resorted to unless the attachment is absolutely void.[5]

The bond being for the security of a firm against the wrongful suing out of the attachment, a partner whose property is tortiously seized has an action for the trespass, but not on the bond.[6]

An action on the bond, or any other direct action, is not the only relief the attachment defendant may have for the damage he has sustained by the wrongful suing out of the writ; for, since a bond is a contract and the attachment can not issue

1. Grant *v.* Deuel, 3 Rob. (La.) 17.

2. Hall *v.* Forman, 82 Ky. 505.

But having first sued on the bond and recovered actual damages can he thereafter recover exemplary damages for the malice in an action on the case?—*Quere.*

3. Kirksey *v.* Jones, 7 Ala. 622. See *post*, § 190, "Recovery."

4. Dyer *v.* Sharp, 2 Pa. Co. Ct. 216; Plunkett *v.* Sauer, 101 Pa. St. 356.

5. Owens *v.* Starr, 2 Littell (Ky.) 230.

6. Mason *v.* Rice, 66 Iowa 174. See further as to who may bring action on the bond, *post*, § 185, "Plaintiffs."

until after the bond is given, the damages occasioned by the attachment arise *ex contractu* and may be set off in a subsequent action brought by the attachment plaintiff for the demand sought to be recovered by the attachment. The damages resulting from the closing of a factory for a month by the attachment have been so set off.[1] And unliquidated (?) damages, when the same are capable of being calculated by a fixed standard, form a proper subject for such set-off.[2]

§ 183. (b) **When the action accrues.**—The time when an action on the bond accrues depends largely upon the conditions named in the bond, whether it be to indemnify the defendant in attachment against the wrongful issuing of the writ, or whether it be that the plaintiff will prosecute his suit to effect, and pay such damage as may be suffered, in case he failed to sustain the cause of action as alleged; and the like. The right of action on the bond for the attachment, having been wrongfully sued out, accrues in Iowa as soon as the attachment defendant is disturbed in the possession of his property by the levy of the writ.[3] Nor is it required, under the Indiana statute, that there should have been an issue made on the affidavit and a finding for the defendant. There may be two results without it, either of which will entitle the attachment defendant to an action on the undertaking; (1) when the plaintiff has failed in his action after having proceeded wrongfully and oppressively, and (2) when, although the plaintiff has succeeded, the proceeding has been wrongful and oppressive, a right of action accrues on the undertaking whether the plaintiff has good cause for his main action or not, or whatever the result of the main

1. Plunkett *v.* Sauer, 101 Pa. St. 356; Halfpenny *v.* Bell, 82 Pa. St. 128.

2. Hunt *v.* Gilmore, 59 Pa. St. 450.

3. Campbell *v.* Chamberlain, 10 Iowa 337.

And where willfully as well as wrongfully sued out, exemplary damages also may be recovered. Campbell *v.* Chamberlain, 10 Iowa 337. See as to "Recovery," *post*, § 190.

But there must be a finding by the jury that there was no reasonable grounds for believing the allegations on which it was based. This makes it wrongful, and actual damages may be recovered, but the same facts will not raise a presumption of malice so as to support a recovery of exemplary damages. Nordhaus *v.* Peterson, 54 Iowa 68.

action may be.[1] In Kentucky it is said to be well settled that no action will lie on an attachment bond for maliciously suing out the writ until the *attachment* shall have been discharged.[2] The same was true in New York and is in Kansas and Missouri although a suit may be brought before final judgment in the attachment if after dissolution.[3] But where the effect of a judgment is to vacate the attachment, the sureties on the bond may be liable for costs in the action, notwithstanding the attachment has not been formally vacated.[4] And it would seem to be a rule of general application that where a plaintiff voluntarily abandons his attachment, he renders himself and his sureties liable in damages. Where such attachment has been set aside by order of the court it is *prima facie* evidence that it was illegally issued.[5] In Illinois the principal and sureties on the bond are liable for all damages occasioned by the wrongful issuing out of the writ, and this, too, whether or not the suit progresses to judgment.[6] But an action on a bond conditioned to pay the damages "if the plaintiff fail to prosecute the action, commenced by said attachment, with effect," can not be maintained until the entire proceeding is terminated. The condition can not be construed to mean if he shall fail to prosecute the *attachment*—"action" and "attachment" not being synonymous words.[7] And where the condition of the bond is

1. Harper *v.* Keys, 43 Ind. 220.

2. Nolle *v.* Thompson, 60 Ky. (3 Metc.) 121.

And such discharge must be alleged in the declaration. Nolle *v.* Thompson, 60 Ky. (3 Metc.) 121. See *post*, § 187, "Pleading."

3. Dunning *v.* Humphrey, 24 Wend. (N. Y.) 31; Kerr *v.* Reece, 27 Kan. 469; State *v.* Gage, 52 Mo. App. 464.

And the plaintiff can not recover the value of the property levied on, if he has not been dispossessed; and if he has not been subjected to costs, he is entitled to only nominal damages. Groat *v.* Gillespie, (N. Y.) 25 Wend. 383.

4. Lee *v.* Homer, 37 Hun (N. Y.) 634.

But in Nebraska, an action can not be maintained on the bond, where there has been service and appearance of the attachment defendant, until after judgment dismissing the attachment. Eckman *v.* Hammond, 27 Neb. 611, 43 N. W. Rep. 397.

5. Cox *v.* Robinson, 2 Rob. (La.) 313; Littlejohn *v.* Wilcox, 2 La. Ann. 620; Nockles *v.* Eggspieler, 47 Iowa 400; Petitt *v.* Mercer, 8 B. Mon. (Ky.) 51; Steinhardt *v.* Leman, 41 La. Ann. 835. See *post*, § 188, "Proof in Action on Bond."

6. Bliss *v.* Heasty, 61 Ill. 338.

7. Harbert *v.* Gormley, 115 Pa. St. 237.

to pay money attached so far as the effects shall be found liable to the plaintiff's demand, there is no breach of the condition of the bond until after some judgment has been rendered fixing the amount and finding the effects liable.[1] Nor can an action be maintained upon a bond conditioned to pay "all such damages as shall be awarded against the plaintiff in the attachment in any suit or suits which may thereafter be brought for wrongfully suing out the attachment," until after judgment is obtained against the plaintiff in the attachment suit.[2] And on a bond conditioned for the payment to the defendant of all damages sustained by reason of the issuing of the attachment, if the plaintiff shall fail to recover judgment in the attachment, the liability will not attach because of the dissolution of the attachment, unless the plaintiff fails to recover judgment.[3] But where the conditions of the bond relate only to the attachment and not to the cause of action itself, a failure to sustain the attachment suit would clearly entitle the attachment defendant to recover accrued damages.[4]

Where the non-existence of the debt for which an attachment issues is proven, it is, as a matter of course, a breach of the attachment bond and will entitle the defendant to recover in a suit thereon for the damages he has sustained.[5] And where a judgment is rendered in favor of the defendant on the merits he may sue the plaintiff on the bond for damages, although he may not have entered a plea in abatement.[6]

The states are likewise divided in the matter of bringing the action against the sureties on the bond in the first instance, or first establishing the liability of the principal by an action against him alone. And this contrariety is owing to the dif-

1. Moore *v.* Allen, 55 Ga. 67.

2. Sterling City, etc., Mining Co. *v.* Hughes, 3 Col. 229; Sterling City Mining Co. *v.* Cock, 2 Col. T. 24.

And then only for the amount of such judgment, and if the condition respecting the payment of costs has been omitted from the bond they can not be recovered. Sterling City Mining Co. *v.* Cock, 2 Col. T. 24.

3. Hahn *v.* Seifert, 64 Mich. 647, 31 N. W. Rep. 564; Harbert *v.* Gormley, 115 Pa. St. 237, 8 Atl. Rep. 415.

4. Kennedy *v.* Meacham, 18 Fed. Rep. 312.

5. Tucker *v.* Adams, 52 Ala. 254.

6. State *v.* Beldsmeier, 56 Mo. 226.

ferent views taken regarding the undertaking of the surety; whether it be a contract absolutely to indemnify the defendant or merely a contract of suretyship depending upon the liability of the principal.[1] In Washington it is not necessary either to make a demand on the principal in an attachment, or to sue him for damages resulting from a wrongful attachment before bringing action against the sureties on such bond.[2] And the same maintains in Alabama, Illinois, Pennsylvania, Tennessee and Virginia.[3] In Maryland, the defendant in attachment can recover the costs of such proceedings, as against the bondsmen, although he has not previously sued the plaintiff in attachment for such costs; but he can not recover other damages.[4] And in that state and Georgia, to make the sureties liable for damage done by reason of a wrongful attachment, such damage must first be ascertained in a suit against the plaintiff alone.[5] In Louisiana the surety is not liable until the condition of the bond is forfeited, and the principal put in delay. Therefore judgment can not be entered in an action in which a surety is a party where no judgment is entered against the principal.[6] And in Mississippi a *joint* action can not be maintained on the bond against the principal and sureties until after a recovery is had in a separate suit thereon against the principal, because the bond is conditioned only to pay such damages as may be awarded in a suit against him.[7]

The actual payment of the damages sustained seems not to

1. Pinney *v.* Hershfield, 1 Mont. 367.

2. Seattle Crockery Co. *v.* Haley, 6 Wash. 302, 33 Pac. Rep. 650.

3. Herndon *v.* Forney, 4 Ala. 243; Churchill *v.* Abraham, 22 Ill. 455; Hibbs *v.* Blair, 14 Pa. St. 413; Smith *v.* Story, 4 Humph. (Tenn.) 168; Dickinson *v.* M'Craw, 4 Rand. (Va.) 158.

4. McLuckie *v.* Williams, 12 Atl. Rep. 1, 68 Md. 262.

5. McLuckie *v.* Williams, 68 Md. 262; Sledge *v.* Lee, 19 Ga. 411; and see Freeman *v.* Young, 3 Robt. (N. Y.) 666.

6. Goodman *v.* Allen, 8 La. Ann. 381; Fraser *v.* Thorpe, 11 La. Ann. 47.

A *fi. fa.* is proper against the principal before proceeding against the surety. Goodman *v.* Allen, 8 La. Ann. 381.

A return on a *fi. fa.* that it was impossible to make a demand on defendant personally, and that no property of his could be found, authorizes plaintiff to proceed against the surety. Collins *v.* Edwards, 13 La. Ann. 342.

7. Holcomb *v.* Foxworth, 34 Miss. 265.

be a condition precedent to the bringing of an action against the obligors on the bond; all that is necessary being that the plaintiff in the suit on the bond will be liable for the same.[1] But only such damages as the defendant will be legally liable to pay may be recovered. For example, if a married woman's contract can not be enforced at law, the subject-matter is not an item for recovery in an action on an attachment bond.[2]

The obligors in an attachment bond are liable, notwithstanding the fact that the bond was given in a proceeding under a statute which is unconstitutional.[3] Furthermore, a bond itself, though not good under the statute, may yet be good at common law.[4]

Although the attachment plaintiff may have had a good cause of action, yet if he fails to recover on account of some irregularity in the proceeding posterior to the bond, the sureties will not be liable.[5]

An action may be had on a lost or destroyed bond. The bond being once given, the same action will lie upon it after destruction as before.[6]

Where the attachment has been wrongful the obligee may recover the actual damages he has sustained, without first having brought suit for the *malicious* act of suing it out, and though such an action can not be sustained. The intention of the statute is to recompense the attachment defendant for the damage done to him notwithstanding the plaintiff may have acted in good faith.[7] When an action for malicious attachment can be maintained will be the subject of a subsequent article.[8] But any person may be proceeded against for malicious attachment whose direct malicious act caused the writ

1. Metcalfe *v.* Young, 43 Ala. 643.

2. State *v.* Kevill, 17 Mo. App. 144.

3. State *v.* Stark, 75 Mo. 566.

4. See *ante*, § 155; Williams *v.* Coleman, 49 Mo. 325.

A maker of a bond, who, by his own acts, brings about a dissolution of attachment, will not afterwards be permitted to deny the validity of the bond. Williams *v.* Coleman, 49 Mo. 325. See also Cook *v.* Boyd, 16 B. Mon. (Ky.) 556.

5. Garretson *v.* Zacharie, 8 Martin n. s. (La.) 481.

6. Wheeler *v.* Slavens, 13 Smedes & Marshall (Miss.) 623.

7. Churchill *v.* Abraham, 22 Ill. 455.

8. See *post*, § 370.

to be issued, even though the principal for whom he acted as agent knew nothing of the transaction. The principal himself will be liable on his bond or otherwise, unless it is shown that the agent had no authority to attach, and that his act was repudiated as soon as knowledge of it was received.[1]

§ 184. (c) **Must be damages to sustain the action—Malice unnecessary.**—A defendant in attachment can not recover in an action on the attachment bond unless he shows not only that the attachment was wrongful but that he has sustained some damage; the mere fact that the plaintiff in the attachment did not recover, is not sufficient.[2] And such damages must be the natural and proximate consequence of the act of suing out the attachment.[3]

How malicious soever the act of suing out the attachment may have been, the general rule is that no action may be had on the bond if a ground existed for such attachment.[4] Vexation without wrong is no ground for a recovery.[5] But if the cause alleged did not exist in fact, no matter how well founded an attachment plaintiff's belief was that it did exist, the attachment was wrongful, and the attachment defendant may, in an action on the bond, recover such costs and damages as he sustained in consequence of such wrongful attachment by being deprived of his property, together with costs and expenses.

1. Seattle Crockery *v.* Haley, 6 Wash. 302, 33 Pac. Rep. 650.

2. Winsor *v.* Orcutt, 11 Paige (N. Y.) 578; Britson *v.* Tjernagel, (Iowa) 57 N. W. Rep. 872; Mayne *v.* Council Bluffs Sav. Bank, 80 Iowa 710, 45 N. W. Rep. 1057.

3. Jefferson County Sav. Bank *v.* Eborn, 84 Ala. 529, 4 So. Rep. 386. See *post*, § 188, "Proof."

While costs for defending the attachment may be an element of damage, the cost of defending the original suit on which the attachment issued is not an element of damages in an action on the bond. White *v.* Wyley, 17 Ala. 167.

4. Calhoun *v.* Hannan, 87 Ala. 277; Grant *v.* Deuel, 3 Rob. (La.) 17.

5. Jackson *v.* Smith, 75 Ala. 97. See "Malicious Attachment," *post*, § 370.

Therefore, if the attachment was sued out on just grounds and was abated on plea, because of a defect on the affidavit, the attachment defendant can not recover even actual damages. Sharpe *v.* Hunter, 16 Ala. 765.

However, such a case will seldom arise under the present practice, because the attachment plaintiff will, in all probability, have amended his affidavit and sustained his attachment.

Probable cause does not affect the recovery of actual damages.[1] But the wrongful suing out of the attachment will not be inferred from the voluntary dismissal of the suit,[2] unless such suit was abandoned under circumstances showing that it was not instituted in good faith. In such a case the attachment defendant may, in an action on the bond, recover his damages and the costs of defending the attachment.[3] Even though there is probable cause for believing that the alleged grounds do exist, and the plaintiff does act *without* malice, he and his sureties are nevertheless liable to actual damages, and although he voluntarily abandons his suit; because it is said that "any other construction of law would open the door for the right of attachment to be used as a means of profitable speculation and the extinguishment of the debt in damages."[4]

Malice, as it pertains to the amount of the recovery in an action on the bond, will be subsequently considered.[5] And the question of damages recoverable in an action on the case for "malicious attachment" will be considered in a subsequent chapter.[6] The injured attachment defendant may have his election as to which remedy he will pursue against his attach-

1. Churchill *v.* Abraham, 22 Ill. 455; Petitt *v.* Mercer, 8 B. Mon. (Ky.) 51; Kennedy *v.* Meacham, (Tenn.) 18 Fed. Rep. 312; Woods *v.* Huffman, 64 Tex. 98; Bear *v.* Marx, 63 Tex. 298; Pollock *v.* Gantt, 69 Ala. 373; Durr *v.* Jackson, 59 Ala. 203; Metcalf *v.* Young, 43 Ala. 643; Donnell *v.* Jones, 13 Ala. 490; Alexander *v.* Hutchinson, 9 Ala. 825. See Dent *v.* Smith, 53 Iowa 262; Vorse *v.* Phillips, 37 Iowa 428; Seattle Crockery Co. *v.* Haley, 6 Wash. 302, 33 Pac. Rep. 650.

2. Nockels *v.* Eggspieler, 47 Iowa 400. The recovery of even nominal damages in such a case is a question for the jury. Nockels *v.* Eggspieler, 47 Ia. 400.

3. Littlejohn *v.* Wilcox, 2 La. Ann. 620.

The supreme court, holding under the rule of the common law that one man can not sue another for having sued him, unless the suit of the latter was with malice and without probable cause (2 Greenl. Ev., § 449), said that there must also be malice on the part of the plaintiff, coupled with the want of probable cause for bringing the attachment, or no action can be sustained on the bond. Sledge *v.* McLaren, 29 Ga. 64.

And that the burden is upon the plaintiff in such action to show that the attachment was taken with malice and without probable cause. Sledge *v.* McLaren, 29 Ga. 64.

4. Steinhardt *v.* Leman, 41 La. Ann. 835.

5. See *post*, § 190, "Recovery in Action on the Bond."

6. See *post*, § 370.

ing *creditor*. The sureties are, of course, only liable on their contract—the bond.

§ 185. (d) **Plaintiff to action on bond.**—The debtor who has been made a defendant in the attachment suit is the only person who can bring suit on the attachment bond. A third person whose goods have been seized as property of such debtor can not.[1] But the benefits of the bond enure to each and every one of the defendants aggrieved by the suing out of the attachment. If they have a common interest, as in the case of partners, a suit on the bond should be begun in the name of all of them. On the other hand, if only one of the several defendants is in fact injured, it is equally clear that he alone may sue on the bond. Furthermore, he may bring the suit in the name of all for his use.[2] Parties suffering a joint injury may, of course, recover in a joint action.[3] And it seems that where the attachment suit was joint and the judgment thereon entered in the name of the partners jointly, joint damage having been sustained, the action on the bond must be joint.[4] A joint action may be maintained, although the attachment was levied upon the separate property of each of the defendants in which they had no joint interest.[5] And where the bond was executed to several, containing a condition to pay *them* such damages as they may sustain by the wrongful suing out of the attachment, all the obligees may join in an action on the bond, notwithstanding the fact that the attachment was levied on the individual property of only one of them.[6] And such only of the

1. Davis *v.* Commonwealth, 13 Gratt. (Va.) 139.

2. Renkert *v.* Elliott, 11 Lea (Tenn.) 235; Voorheis *v.* Eiting, (Ky.) 22 S. W. Rep. 80.

3. Cochrane *v.* Quackenbush, 29 Minn. 376; Alexander *v.* Jacoby, 23 Ohio St. 358.

4. King *v.* Kehoe, (Iowa) 58 N. W. Rep. 1071; Faulkner *v.* Brigel 101 Ind. 329.

An attachment was brought against two defendants jointly, one of whom was a non-resident, and an attachment bond was given, payable to the "defendants" for all the damage "he" might sustain. The sheriff seized a stock of goods owned by them as partners; but the judgment was rendered for both defendants, after which it was held that the non-resident defendant had no right of action on the attachment bond. Faulkner *v.* Brigel, 101 Ind. 329.

5. Boyd *v.* Martin, 10 Ala. 700; Weedon *v.* Jones, (Ala.) 17 So. Rep. 454.

6. Sloan *v.* Langert, 6 Wash. 26, 32 Pac. Rep. 1015.

In Alabama, the bond being pay-

obligees as have an interest in the damages sought to be recovered may join without the others.[1] In Texas a husband and wife may join in an action for the wrongful seizure of property on attachment.[2] But in Louisiana the husband, who has obtained a judgment in an attachment suit brought by his wife for a separation of property and restitution of her separate estate, can not sue the surety for damages.[3]

On the principle that the action enures to all of the defendants who suffer injury by the attachment, a bond reciting that it is payable to one of the defendants, naming him "*et al.*" in an attachment suit brought against three named defendants, the bond enures to the benefit of the two which it does not name as well as to the one named therein.[4] But a bond executed to the defendant does not enure to the benefit of a third person who intervenes and establishes his right to the property attached.[5] There is no privity between the intervener in a suit already begun and the sureties on the attachment bond, and he can not avail himself of the penalty named therein.[6] Nor is a third person, whose property is attached, entitled to sue for a relief on the attachment bond.[7] Nor does, in West Virginia, a bond conditioned to pay all damages "sustained by any person by reason of the suing out of said order of attachment" enure to the benefit of the sheriff who levied the attachment and took care of the property.[8]

§ 186. (e) **Parties defendant to action on bond.**—The obligors who executed the bond are, of course, proper parties defendant in an action thereon for the recovery of the penalty

able jointly, the action *must* be brought jointly, though the damage accrued to only one. Masterson *v.* Phinizy, 56 Ala. 336; Hadley *v.* Bryars, 58 Ala. 139.

1. Alexander *v.* Jacoby, 23 Ohio St. 358.

2. Craddock *v.* Goodwin, 54 Tex. 578.

3. Le Blanc *v.* Guidry, 3 La. Ann. 564.

4. Renkert *v.* Elliott, 11 Lea (Tenn.) 235.

5. Edwards *v.* Turner, 6 Rob. (La.) 382.

6. Raspillier *v.* Brownson, 7 La. 232.

7. Davis *v.* Com., 13 Gratt. (Va.) 139.

8. Mitchell *v.* Chancellor, 14 W. Va. 22.

named therein, but the principal alone may first be made party defendant to an action for damages,[1] or the sureties may be joined with the principal in an action on the bond to recover compensation for the injury caused by the wrongful suing out of the attachment.[2] And the principals in the attachment bond are proper parties, though the bond was signed only by the sureties.[3] But when the undertaking is signed only by the sureties, an action thereon may be had against them, without joining their principal as a party defendant.[4] When, however, the sureties on an attachment bond are sued without their principal, the principal himself may claim the right to become a party if he has obtained a judgment in the attachment suit against the plaintiff.[5]

One who is surety on an attachment bond, conditioned for the payment of damages which the defendant may sustain by reason of the wrongful suing out of the writ, can not be made liable for the non-payment of a judgment obtained against the attachment plaintiff by default in a suit to which the surety was not a party.[6]

A corporation may be held, not only to actual damages, but to exemplary damages, in an action on the bond, although it sued out the attachment by an agent.[7]

Where an administrator sues out an attachment wrongfully, he can be held personally for the damage he occasions to the defendant, but he can not, by his tortious conduct, subject the estate he represents to an action for damages.[8]

The sureties on an indemnity bond, preliminary to the issue of an attachment, are not liable for the tort where the sheriff converted the goods to his own use while making the levy, unless they assisted, directed, advised or contemplated it. Against

1. And in some states the action must first be brought against him. See *supra*, § 183, "When the Action Accrues."

2. Jenning *v.* Joiner, 1 Coldwell (Tenn.) 645.

3. Hoskins *v.* White, 13 Mont. 70, 32 Pac. Rep. 163

4. Eckman *v.* Hammond, 27 Neb. 611.

5. Gerson *v.* Hanson, 34 Kan. 590. Disapproving Sawyer *v.* Chambers, 11 Abb. (N. Y.) Pr. 110.

6. Bunt *v.* Rheum, 52 Iowa 619.

7. Jefferson Co. Sav. Bank *v.* Eborn, 84 Ala. 529.

8. Gilmer *v.* Wier, 8 Ala. 72.

the sureties, who are strangers to the controversy and not interested in the result, malice can not be presumed, although they signed the bond without examining into the merits of the cause.[1]

§ 187. (f) **The pleading in an action on the bond.**—Following the general rules applicable to other actions, no recovery can be had in an action on the bond, except for causes stated in the declaration or complaint.[2] And it must aver in what the impropriety consists within the meaning of the statute. It is not sufficient merely to state in the declaration that the attachment was improperly issued; it should state the dissolution, the grounds of its dissolution, and show such a failure to comply with the conditions of the bond as will give a right to sue thereon.[3] To show a right of action on the bond, the complainant must aver that he has sustained damages by reason of the attachment, the manner in which such damages have arisen, and that they have not been paid.[4] And the facts alleged must be such in general as would sustain a common law action, and if exemplary damages are sought, such as would sustain an action for malicious prosecution.[5] The conditions of the bond and the facts constituting the breaches must generally be alleged.[6] Although it has been said that the plaintiff may frame his declaration on the penalty of the bond and assign the breaches of condition in his replication to the plea of performance;[7] the theory upon which such practice depends being that the obligor, by the penal part of the bond, admits a debt presently due, and therefore that it rests with him to show

1. Dawson *v.* Baum, 3 Wash. T. 464, 19 Pac. Rep. 46.

2. Benedict *v.* Bray, 2 Cal. 251.

3. Steen *v.* Ross, 22 Fla. 480.

4. Winsor *v.* Orcutt, 11 Paige (N. Y.) 578; Church *v.* Campbell, 35 Pac. Rep. 381, 7 Wash. 547.

5. Pinson *v.* Kirsh, 46 Tex. 26.

If it avers the execution of the bond and gives its conditions *in hæc verba*, assigning breaches, to which no objection is taken, it will be good after verdict, and not fatally defective for want of an averment to the effect that an affidavit was filed, for the attachment, if it does aver that a plea in abatement was filed, and trial and judgment had upon the issues tendered by it. State *v.* Pace, 34 Mo. App. 458.

6. Ryder *v.* Thomas, 32 Iowa 56; Horner *v.* Harrison, 37 Iowa 378.

7. Davis *v.* Dickson, 2 Stew. (Ala.) 370.

a continuance of the condition upon which alone the penalty is deferred.[1]

When no action can be had on the bond for wrongfully or maliciously suing out the attachment until the attachment shall have been discharged, such discharge must be alleged in the declaration.[2] And when the contract of the sureties is such that they are liable only in the event the principal will not pay the costs and damages sustained, the declaration or complaint must show that the attachment plaintiff has not performed his duty in this regard.[3]

There is no necessity that the recitals in the bond and affidavit should be carried into the declaration in the action on the bond.[4]

The declaration must show that the process was wrongfully or vexatiously sued out in the attachment, even when it issues upon the affidavit of an agent, and that thereby the obligee has sustained damages. The declaration is bad if it asserts that the attachment was wrongfully and vexatiously sued out by the obligor on such bond.[5] The declaration must allege that the attachment was wrongfully sued out, which means that just grounds for it did not exist. To show that it was quashed is not enough.[6] Where being "wrongfully" sued out entitles one to actual damages only, and being "vexatiously" sued out entitles him to exemplary damages, and the declaration avers that the attachment was sued out "maliciously" and "vexatiously," but fails to assign a breach sufficient to recover ex-

1. Herndon *v.* Forney, 4 Ala. 243.

It is further said that the proper course to compel the assignment of breaches in such case is to plead performance; or such plea as will show a continuance of the condition. Herndon *v.* Forney, 4 Ala. 243.

2. Nolle *v.* Thompson, 3 Metc. (Ky.) 121. See *contra*, McLaughlin *v.* Davis, 14 Kan. 168.

3. Pinney *v.* Hershfield, 1 Mont. 367.

4. Reynolds *v.* Bell, 3 Ala. 57.

5. Flanagan *v.* Gilchrist, 8 Ala. 620; McCullough *v.* Walton, 11 Ala. 492.

If it is wrongfully sued out, the plaintiff is restricted in his recovery to the extent of the actual injury, but if maliciously sued out, the case is one for vindictive damages, only in the event that the plaintiff has wontonly or maliciously resorted to the process. McCullough *v.* Walton, 11 Ala. 492. See *post*, § 190, "Recovery."

6. Eaton *v.* Bartscherer, 5 Neb. 469.

emplary damages, the words "and vexatiously" will be treated as surplusage, and will not be grounds for a demurrer to the whole amount.[1]

When vindictive or exemplary damages are sought to be recovered, both malice and want of probable cause must be alleged and proved.[2] For actual damages are recoverable when it is wrongful, and vindictive damages where it is both wrongful and malicious. The averment that the attachment was sued out "with intent to harass and injure the defendant" is sufficient in Texas to justify an award of exemplary damages.[3] In Missouri under a general allegation only, a recovery can not be had for the expenses incurred by the plaintiff in traveling to the place of trial, nor for attorney's fees.[4]

Attorney's fees for services in defending the attachment may be recovered from the principal or surety by an action on the bond when specially claimed in the declaration as a part of the damages.[5] But if the declaration fails to state that the suit has terminated, the amount of the costs, and that the plaintiff has actually paid such fees, it is demurrable.[6] The averment that the plaintiff in the action on the bond was compelled to pay "large sums of money and was put to great expense and trouble in and about defending said action of attachment, to wit, $500," will authorize the introduction of evidence touching special damages, such as lawyer's fees, hotel bills, etc.[7]

When a recovery is sought for deterioration in the value of

1. McLane *v.* McTighe, 8 So. Rep. 70, 89 Ala. 411.

2. Accessory Transit Co. *v.* McCerren, 13 La. Ann. 214; Seattle Crockery Co. *v.* Haley, 6 Wash. 302, 33 Pac. Rep. 650; Crofford *v.* Vassar, 10 So. Rep. 350, 95 Ala. 548.

3. Reed *v.* Samuels, 22 Tex. 114.

4. State *v.* Blackman, 51 Mo. 319.

5. Burton *v.* Smith, 49 Ala. 293; Vorse *v.* Phillips, 37 Iowa 428; Moore *v.* Stanley, 51 Mo. 317; State *v.* Blackman, 51 Mo. 319.

6. Elder *v.* Kutner, 97 Cal. 490, 32 Pac. Rep. 563; Crofford *v.* Vassar, 95 Ala. 548, 10 So. Rep. 350; Sterling Mining Co. *v.* Cock, 2 Col. T. 24.

7. Kelly *v.* Beauchamp, 59 Mo. 178. And further the averment that the plaintiff "was required to pay out large sums of money in the defense of the suit and suffered great loss of time in attending thereto, and was deprived of the use of money attached and was injured in his business," etc., is sufficient to warrant the recovery of attorney's fees and extra expenditures in the suit. State *v.* McHale, 16 Mo. App. 478.

the property attached, such deterioration must be specially pleaded.[1]

The declaration should not only set out the bond and the breach of the conditions therein, but it should, in Iowa at least, allege that the attachment plaintiff did not have sufficient reason to *believe* the alleged grounds for the attachment to be true;[2] to aver that the facts are not true is not sufficient.[3] In some states, however, it is held that if the alleged grounds for attachment did not in fact exist, the attachment was wrongful; that the fact that the party believe them to exist is not the test of whether there is a rightful or wrongful issuance of the attachment and of the fact whether the condition of the bond is violated or not.[4] And it is then not necessary to aver a want of probable cause in suing out the attachment.[5] A want of probable cause goes to the question of *malice*, and should be averred in a declaration in an action on the case for malicious attachment.[6] A want of probable cause is sufficiently set out in a declaration which avers that the attachment has been sued out, brought to issue, tried and adjudged void, without cause, tortious and oppressive, and that the plaintiff has been much oppressed and put to great trouble and expense in defending himself against said false, feigned and vexatious proceeding of the defendant.[7]

The declaration or complaint, in an action for a breach of condition in an attachment bond, must aver that the damages sued for are unpaid.[8]

1. Wallace *v.* Finberg, 46 Tex. 35.

See as to plea of reconvention by the defendant in the attachment suit. Wallace *v.* Finberg, 46 Tex. 35.

2. Bunt *v.* Rheum, 52 Iowa 619; Burton *v.* Knapp, 14 Iowa 196; Mahnke *v.* Damon, 3 Iowa 107.

3. Winchester *v.* Cox, 4 G. Greene (Iowa) 121. Compare Abbott *v.* Whipple, 4 Greene (Iowa) 320; Porter *v.* Wilson, 4 Greene (Iowa) 314.

A petition setting forth this ground for the action need not state the substance of the affidavit. Porter *v.* Wilson, 4 Greene (Iowa) 314.

4. Petitt *v.* Mercer, 47 Ky. 51.

5. McLaughlin *v.* Davis, 14 Kan. 168.

6. See *post*, § 376.

7. Morris *v.* Price, 2 Blackf. (Ind.) 457.

8. Morgan *v.* Menzies, 60 Cal. 341; Horner *v.* Harrison, 37 Iowa 378; Michael *v.* Thomas, 27 Ind. 501; Uhrig *v.* Sinex, 32 Ind. 493; Pinney *v.* Hershfield, 1 Mon. T. 367.

In an action on an attachment bond given in another state, in a suit in which the court of that state had obtained jurisdiction of the subject-matter, it will be presumed that the court had jurisdiction to issue the attachment, although no statute of that state authorizing attachment is pleaded, whereby the same may be determined.[1]

A demurrer to the declaration in an action on the bond has been sustained where a joint action was improperly brought;[2] again where an action was brought on a void bond,[3] and again where the plaintiff's declaration in an action against the sureties failed to state specially that the plaintiff had paid the attorney's fees sought to be recovered.[4]

The plea is a matter of great importance at common law, and when the condition of the bond or undertaking as set out in the declaration is to indemnify and save harmless, a plea of *non damnificatus* is the recognized mode of defense.[5] And where the condition of an attachment bond is to pay all costs and damages which may be awarded against the attachment plaintiff, or sustained by any person by reason of his suing out said attachment, then the obligation to be void, otherwise to remain in full force, the condition is the same, and a plea of *non damnificatus* is the proper mode of defense.[6] But a plea of *non damnificatus* as to part, and a tender as to a sum certain, as to a residue, in bar of the action, can not be sustained, because one admits what the other denies.[7] A plea *de injuria* is likewise a good plea to a suit on an attachment bond.[8] When the plaint-

1. Cunningham *v.* Jacobs, 120 Ind. 306, 22 N. E. Rep. 335.

2. Faulkner *v.* Brigel, 101 Ind. 329.

3. Harville *v.* Meyers, 1 Brev. (S. C.) 3.

This was a bond given in an attachment before a justice of the peace when the demand sought to be recovered exceeded the jurisdiction of this court. Harville *v.* Meyers, 1 Brev. (S. C.) 3.

4. Elder *v.* Kurtner, 97 Cal. 490, 32 Pac. Rep. 563.

5. 1 Chitty Pl., p. 520; 3 Chitty Pl., p. 9, 84, 5; Cutler *v.* Southern, 1 Saunders 116; Cox *v.* Joseph, 5 Term Rep. 307; Hulland *v.* Malken, 2 Wilson 126.

6. Hoadley *v.* Roush, 3 W. Va. 280.

In an action of "debt," a bond conditioned to save a garnishee harmless for paying over the debt; a plea of *non-damnificatus* and a replication setting out the attachment and condemnation is good on demurrer. Brook *v.* Macnemara, 1 Har. & M. (Md.) 80.

7. Dunning *v.* Humphrey, 24 Wend. (N. Y.) 31.

8. Hoadley *v.* Roush, 3 W. Va. 280.

iff sets forth conditions in his declaration, or a copy of a bond that varies from the one the defendant signed, a plea of *non est factum* will be proper. As before shown,[1] the plaintiff may declare on the penalty without setting forth the conditions and averring a breach, leaving this to be done after the defendant craves oyer. When the defendant craves oyer and sets it out and then pleads *non est factum*, if the plaintiff produces such a deed on the trial as is set forth in the oyer, the defendant will be too late to take advantage of the variance between the deed produced and that mentioned in the declaration. He should have demurred. But when oyer has not been demanded and set forth in the plea, although it may have been furnished, the defendant under the plea of *non est factum* may insist on the trial that the plaintiff shall produce such a deed as he has alleged in his declaration to exist.[2]

When the plaintiff has not assigned the specific breaches on which he seeks a recovery,[3] it is said that a plea of performance is the proper one to compel him to do so. But this must be construed as merely illustrating the mode of pleading, for it will readily occur to any one that in those cases where the condition of the bond is to omit the doing of any act, the allegation of the omission will be equivalent to the assertion of the performance of the condition in other cases. So, likewise, if the forfeiture of the condition is to depend upon doing some act after notice from the obligee (as in the case of a condition to pay a sum of money upon notice) an averment in the plea that the notice was not given will be equivalent to the usual averment of general performance in other cases. The theory upon which this practice depends is that the obligor, by the penal part of the bond, admits a debt presently due, and therefore it rests with him to show the continuance of the condition,

1. See *supra*.

2. Rochefeller *v.* Hoysradt, 2 Hill (N. Y.) 616.

In an action brought upon a bond given in a justice's court in New York under the old practice, the defendant may prove, in mitigation of damages under the plea of *non est factum*, that the property was sold by a constable, and that a portion of the proceeds was applied by him to the payment of an execution issued in another suit. Bennett *v.* Brown, 31 Barb. (N. Y.) 158.

3. See *supra*.

upon which fact alone the penalty is deferred; and this applies to cases on all bonds with negative or affirmative conditions.[1]

Where the bringing of an action on the bond is authorized before the termination of the attachment suit, the pendency of the attachment suit is not good matter either for a plea in abatement or a plea in bar.[2]

In an action on the case for the wrongful and malicious suing out of the attachment, a plea that the defendant had good reason to believe and did believe that the plaintiffs were about to, etc., setting out the facts upon which such belief was founded, will be bad on demurrer, because such belief is no justification of such wrongful and malicious act.[3] But malicious attachment will receive consideration in a subsequent chapter.[4]

A plea to an action on the bond, that the bond was not executed till after the issuance of the writ, and that for that reason the action on the bond should be quashed, is bad on demurrer.[5]

A case in Alabama holds to the extreme that where the plaintiff shows a want of the ground for attachment in the allegations of the affidavit therefor, the defendant in the action on the bond may show other grounds which would authorize the issuance of a general attachment; but it draws the line by saying that where the attachment was sued out on the general ground that the attachment defendant had disposed of property, etc., it can not be shown that he had removed crops without paying rent and without the consent of the landlord, although these grounds would have authorized a special attachment against the crops.[6]

In Alabama, in an action on the bond for wrongfully suing out an attachment where the same was given by a non-resident creditor upon suing out an attachment against a non-resident

1. Herndon *v.* Forney, 4 Ala. 243.

2. Swanner *v.* Swanner, 50 Ala. 66. See also Love *v.* Kidwell, 4 Blackf. (Ind.) 553.

3. Donnell *v.* Jones, 13 Ala. 490.

4. See *post*, § 370.

5. Summers *v.* Glancey, 3 Blackf. 361. But see Benedict *v.* Bray, 2 Cal. 251, which holds that no action can be sustained on a void bond, or a bond in void attachment preceedings. But this must not be confused with an action on the case for damages sustained by void attachment proceedings. See *post*, § 357.

6. Baxley *v.* Segrest, 85 Ala. 183.

debtor, it is no defense to show that although the defendant had sufficient property in the state of his residence to satisfy the particular debt on which the attachment issued, yet he did not there have sufficient to pay all the debts then and there due and owing by him.[1] And in Indiana it is no defense to an action on the bond that more personal property was attached than was sufficient to pay the debt.[2]

The rules regarding set-off may be said to obtain generally in actions on the bond. A demand of the principal may be set-off in an action against the principal and sureties.[3]

§ 188. (g) **Proof in action on bond.**[4]—The burden of proof in an action upon an attachment bond is upon the attachment defendant (the plaintiff in the action on the bond) to show that he has sustained damages.[5] For, as hereinbefore shown,[6] if he does not show some damage he can not recover. The mere fact that the plaintiff in the attachment did not recover is not proof that the defendant was damaged.[7] But where such attachment was set aside by order of the court, it is *prima facie* evidence that it was illegally issued.[8] The burden is also upon the plaintiff in the action on the bond to prove that the attachment was wrongfully issued, *i. e.*, that reasonable grounds for it did not exist, because the presumption is that it was rightfully sued out.[9] And in states where a reasonable belief of the existence of a ground for attachment will justify the bringing of it, when, as a matter of fact, no such grounds does exist, the plaintiff in the action on the bond must not only prove that no grounds for the attachment did exist, but

1. Jones *v.* Lawrence, 36 Ala. 618.

2. Uhrig *v.* Sinex, 32 Ind. 493.

3. Raymond *v.* Green, 12 Neb. 215.

4. The bond itself need not be offered in evidence. The final record in the attachment suit proves it, for if the defendant executed it, he can not dispute its existence or the genuineness of the record. Adams *v.* Olive, 48 Ala. 551.

5. Ranning *v.* Reeves, 2 Tenn. Chy. 263.

6. See *ante*, § 184.

7. Winsor *v.* Orcutt, 11 Paige (N. Y.) 578.

8. Cox *v.* Robinson, 2 Rob. (La.) 313.

9. Dent *v.* Smith, 53 Iowa 262; Burrows *v.* Lehndorff, 8 Iowa 96; Veiths *v.* Hagge, 8 Iowa 163; Calhoun *v.* Hannan, 6 So. Rep. 291, 87 Ala. 277; Mayne *v.* Council Bluffs Sav. Bank, 80 Iowa 710, 45 N. W. Rep. 1057.

he must also show that there was no sufficient cause for believing in their existence.[1]

Whether or not the party bringing the action is entitled to recover damages, is always a question of fact for the jury, but no damage can be recovered unless the attachment was wrongfully sued out and this will not be inferred from the voluntary dismissal of the attachment.[2] And if an attachment, voluntarily dismissed, is shown to have been begun under circumstances evidencing a lack of good faith, it may be taken as the basis of a verdict for damages.[3]

It is not necessary to prove malice in an action for the wrongful suing out of the attachment.[4] Malice can not be presumed as against sureties, though they signed without having first examined into the merits of the cause. They are presumed to be strangers to the controversy, and not interested in the result.[5] In an action against them the questions of "motive" and "probable cause" are immaterial.[6] If, however, the plaintiff in the action seeks to recover from the attachment plaintiff for the *malicious* suing out of the attachment, the burden is upon him to show both that the writ was sued out with malice and without probable cause.[7] In Alabama, vexatious and malicious abuse of the writ may be proved without proving ill-will. The wrongful act is the vexatious abuse contemplated by the statute.[8]

1. Dent *v.* Smith, 53 Iowa 262; Burton *v.* Knapp, 14 Iowa 196; Seattle Crockery Co. *v.* Haley, 6 Wash. 302, 33 Pac. Rep. 650.

2. Nockles *v.* Eggspieler, 47 Iowa 400.

In an action on an attachment bond the fact that the attachment has been dismissed because of the inability of the plaintiff therein to supply a record, the original being burnt, was no evidence that the original attachment was wrongful. Cooper *v.* Hill, 3 Bush (Ky.) 219.

When an attachment is discharged by operation by law, and the obligors are by the conditions of the bond bound unconditionally to perform the judgment of the court in the action, neither the sufficiency of the grounds for the attachment, nor the liability of the property levied on, can be made a subject of inquiry in an action on the bond. Hazelrigg *v.* Donaldson, 2 Metc. (Ky.) 445.

3. Littlejohn *v.* Wilcox, 2 La. Ann. 620.

4. Wilson *v.* Outlaw, Minor (Ala.) 367.

5. Dawson *v.* Baum, 3 Wash. T. 464, 19 Pac. Rep. 46.

6. Elder *v.* Kutner, 97 Cal. 490, 32 Pac. Rep. 563.

7. Sledge *v.* McLaren, 29 Ga. 64.

8. Durr *v.* Jackson, 59 Ala. 203. See further as to "Malicious Attachment," *post*, § 370.

What may be shown as *actual* damages occasioned by the attachment suit is a question that is sometimes difficult to determine. Attorney's fees for having the attachment dismissed can generally be recovered on proof that they were paid, or contracted to be paid, and upon proof that they were reasonable.[1]

Attorney's fees may be recovered when the attachment has been dismissed under circumstances showing the plaintiff did not act in good faith in suing out the attachment.[2] The value of the property or the injury to credit is not an item of recovery when the attachment defendant has not been dispossessed. And where it is not shown that he has been subjected to costs, he is only entitled to nominal damages.[3] Witnesses may testify to the extent of a merchant's business, and the rate or average of his net profits, if within their knowledge, but may not give their *opinion* as to the loss he will suffer in his business.[4] It is proper to show that the merchandise attached is only salable at certain seasons of the year and that in consequence of the attachment, the proper season for that year had passed, and that some of the goods would have to be carried over till next year. Experts may state what this damage is, and the rule that the measure of damages is the difference between the value of the property when seized and the value at the date of the trial is not applicable to such a case.[5] One who has been prevented from completing work he had undertaken to do, by the attachment of his tools and material, may recover consequential damages for the injury proved to be sustained. It is competent for him to show that when his work was suspended by the attachment, he had on hand a quantity

1. Shultz *v.* Morrison, 3 Ky. 98; Brandon *v.* Allen, 28 La. Ann. 60; Phelps *v.* Coggeshall, 13 La. Ann. 440.

And other actual damages occasioned by the attachment suit. Phelps *v.* Coggeshall, 13 La. Ann. 440.

2. Littlejohn *v.* Wilcox, 2 La. Ann. 620; Heath *v.* Lent, 1 Cal. 410.

And notes given for such fees are admissible in evidence in an action on the attachment bond. State *v.* Gage, 52 Mo. App. 464.

3. Groat *v.* Gillespie, 25 Wend. (N. Y.) 383; Heath *v.* Lent, 1 Cal. 410.

4. Pollock *v.* Gantt, 69 Ala. 373, s. c. 44 Am. Rep. 519.

5. Knapp, Spalding & Co. *v.* Barnard, 78 Iowa 347, 43 N. W. Rep. 197.

of stone, cut and dressed, for use in the completion of the work, which was not of equal value for any other purpose.[1]

Proof in defense to an action on the bond is confined to a narrow field. In most states there is nothing that can be shown in defense in an action on an attachment bond for actual damages occasioned by the wrongful suing out of the writ, except the actual existence of the grounds alleged for the attachment.[2] But contrary to the rule that probable cause does not effect the recovery of *actual* damages, and that the attachment plaintiff who has wrongfully sued out the writ can not excuse himself because he acted in good faith,[3] it is the rule in all states where "reason to believe" in the existence of the ground averred gives cause for attachment, that the defendant in an action on the bond may not only show the grounds stated for the issuance of the writ were true in fact, but he may show that he had good cause to believe the ground stated for the writ to be true, and thereby excuse himself for suing out the writ of attachment, and defeat the action for the recovery of the actual damages suffered by the attachment defendant.[4] Under such a rule the plaintiff in the action on the bond has not only the burden in the first instance of showing that the attachment was wrongful, by showing that no grounds for it existed, but he has also the burden of proving want of reasonable cause for believing of their existence, by proof as to the conduct and the good faith of his transactions.[5]

1. Carpenter *v.* Stevenson, 6 Bush (Ky.) 259.

2. And this seems to be no defense in an action for damage to property when the attachment was dismissed because the affidavit was defective. Lobenstein *v.* Hymson, 90 Tenn. 606; 18 S. W. Rep. 250.

Where, however, the bond provides that the plaintiff in attachment "will duly prosecute the attachment and will pay all damages" "if the proceedings shall be wrongful and oppressive," and the statute provides for an action on the bond, "if the proceedings were wrongful and oppressive" such action may be begun when the dismissal of the attachment shows a failure to "prosecute the attachment" and no evidence can be offered by the attachment plaintiff to show that a ground for attachment existed. Vurpillat *v.* Zehner, 28 N. E. Rep. 556, 2 Ind. App. 397.

3. See *supra* § ——.

4. Vorse *v.* Phillips, 37 Iowa 428; Dent *v.* Smith, 53 Iowa 262; Seattle Crockery Co. *v.* Haley, 6 Wash. 302, 33 Pac. Rep. 650.

5. Dent *v.* Smith, 53 Iowa 262; Seattle Crockery Co. *v.* Haley, 6 Wash. 302, 33 Pac. Rep. 650.

"It is no justification nor mitigation of damages that the original indebtedness was a just claim, and that the creditor recovered a judgment upon the same. It does not entitle the party to an attachment simply because his claim is just. Some one of the causes laid down in the statutes must exist or the suing out of the attachment is wrongful."[1]

The defendant in an action on the bond can not set up the illegality of the bond. He will not be heard to say that a proceeding he "set a-going" was not executed according to law.[2] And the maker of a bond who by his own acts brings about a dissolution of the attachment will not afterwards be permitted to deny its validity.[3]

Where the wrongful and *malicious* suing out of the writ of attachment has been averred in the declaration in an action on the attachment bond, and exemplary damages are sought to be recovered, the bringing of an attachment must be proved to be willfully wrong. It must be made to appear that the creditor procured the attachment without reasonable ground to believe the truth of the matter stated in the affidavit and with the intention, design, or set purpose of injuring the attachment defendant.[4] The mere showing that there was no reasonable grounds for believing the truth of the matter stated in the affidavit will not raise the presumption of malice so as to justify the recovery of exemplary damages. It must be further made to appear that there was an intent to injure the debtor.[5] Malice and want of probable cause go to the aggravation of damages, and exemplary damages can only be recovered when there is a malicious or wrongful abuse of the process.[6] Malice, however

1. Drummond *v.* Stewart, 8 Iowa 341.

2. Drummond *v.* Stewart, 8 Iowa 341.

He can not show that his attachment was void. Union Mercantile Co. *v.* Chandley, (Iowa) 57 N. W. Rep. 595.

3. Williams *v.* Coleman, 49 Mo. 25.

This rule will not apply in a suit on a bond given to *dissolve* an attachment. See *post* § 286, and Murphy *v.* Montandon, 2 Idaho 1048, 29 Pac. Rep. 851.

4. Raver *v.* Webster, 3 Iowa 502.

5. Nordhaus *v.* Peterson, 54 Iowa 68.

6. Renkert *v.* Elliott, 11 Lea (Tenn.) 235.

Alabama holds that there may be vexatious and malicious abuse of the writ and a recovery therefor without

great, will not alone sustain a recovery of damages.[1] There must have been a lack of ground on which to bring the attachment.[2] But where malice has been proved, it seems, that slight positive evidence to show that the proceedings were groundless, will be sufficient.[3] It is relevant evidence on the question of malice to show, in an action on an attachment bond, that a second attachment was sued out by the creditor against the debtor one week after the first.[4] But the plaintiff in the action on the bond will not be permitted to give evidence of slanderous words or declarations of the defendant, as plaintiff in the attachment suit, made after the commencement of the suit, without evidence showing that such declarations related directly to the act of suing out the attachment; because other malicious statements made at a later day are not evidence of malice at the time the writ was sued out.[5]

While, as before stated, it is necessary in an action on the bond for the recovery of actual damages to prove that the very grounds stated in the affidavit for the attachment were true, yet when a recovery of vindictive or exemplary damages is sought, the proof of reasonable grounds to believe that the facts stated in the affidavit were true is sufficient.[6] Showing that the attachment plaintiff had probable cause to believe in the existence of the ground stated, negatives the evil *animus* and wrongful purpose which might be imputed to the plaintiff, and will prevent a recovery of any but actual damages.[7] But reports may not be shown unless an offer is made to show that

proving ill-will, on the ground that the wrongful act is the vexatious abuse contemplated by the statute. Durr *v.* Jackson, 59 Ala. 203.

But the majority of the decisions go to the effect that the wrongful act may be made the basis of a recovery of actual damages; and willful and malicious abuse of the process, a basis for the recovery of exemplary damages. See "Malicious Attachment," *post*, §370.

1. Calhoun *v.* Hannan, 87 Ala. 277; Jackson *v.* Smith, 75 Ala. 97; Senecal *v.* Smith, 9 Rob. (La.) 418; Grant *v.* Deuel, 3 Rob. (La.) 17.

2. City Nat. Bank *v.* Jeffries, 73 Ala. 183.

See *ante*, § 182, "Action on the Bond," and § 183, "When the Action Accrues," and it must have been averred in the declaration.

3. Grant *v.* Deuel, 3 Rob. (La.) 17.

4. Ryall *v.* Marx, 50 Ala. 31.

5. Burton *v.* Knapp, 14 Iowa 196.

6. Blum *v.* Strong, 71 Tex. 321.

7. Bear *v.* Marx, 63 Tex. 298.

they were true, or that the plaintiff had reason to believe them to be so.[1] The recovery of vindictive damages may be defeated by proving that the attachment was made on the advice of an attorney, without his having communicated the facts to the non-resident creditor and plaintiff in the attachment suit.[2] To show that he acted without malice, the defendant in the action on the bond may prove that other attachments were issued against the plaintiff one day before his attachment, in connection with evidence that notice thereof was given to him before suing out the process.[3] The wrongful issuing out of an attachment can not be justified by either indebtedness, pecuniary embarrassment, or insolvency, and yet in an action on the attachment bond, where it has been shown that at the time the attachment was sued out the defendant had been negotiating for a sale of his property at a low price, a statement of the attachment defendant that he "was involved and broke," is evidence admissible as pertinent to the question of the bad faith of the conveyance.[4] In an action on the bond in Alabama for the wrongful and malicious suing out of the attachment on the alleged ground that the defendant in attachment was about to remove his property out of this state, so that the plaintiff would probably lose his debt, or have to sue for it in another state, it may be shown in defense that the attachment defendant had fraudulently disposed of his property, or was about to fraudulently dispose of his property.[5] This is, however, owing to the fact that the defendant is not, in that state, limited to the grounds alleged in the affidavit, but may show

1. Schrimpf *v.* McArdle, 13 Tex. 368.

2. City Nat. Bank *v.* Jeffries, 73 Ala. 183.

3. Lockhart *v.* Woods, 38 Ala. 631.

4. Lockhart *v.* Woods, 38 Ala. 631.

And where the defendant has shown the pecuniary embarrassment of the plaintiff at the time the attachment was levied, the plaintiff may show in rebuttal subsisting accounts due him as a physician, as charged in his books, accompanied with evidence of the correctness of the accounts. Lockhart *v.* Woods, 38 Ala. 631.

To prove the ground of fraud, the defendant may show that the plaintiff in the action on the bond used false representations to obtain the credit for the debt sued upon in the attachment suit, or that he had confessed judgment in favor of the parties. Hibbs *v.* Blair, 14 Pa. St. 413.

5. Lockhart *v.* Woods, 38 Ala. 631.

other grounds which would have authorized the issuance of the attachment.[1] Where the defendant in an action on the bond alleges the indebtedness of the plaintiff, and his disposal of and removal from the state of his property, with the intent to defraud his creditors, he may offer evidence of the amount of plaintiff's indebtedness at the time when the writ was sued out, and of the fact that for some time he had been selling his property, and that some two months after that time he had been acting fraudulently.[2]

§ 189. (h) **Record in the attachment suit as evidence in the suit on the bond.**[3]—In an action on an attachment bond, the writ of attachment and the officer's return thereon are admissible in evidence, and the defendant can not rely upon any illegality therein, for if an attachment has been in fact made, the attachment plaintiff will not be permitted to show that the process which he had sued out and set a-going was not executed according to law. Nor will the defective service of the writ render the writ void.[4] The record can not be contradicted; but the plaintiff in an action on the bond may show by extraneous evidence what property of his was seized under the writ and delivered to the plaintiff thereon, by whom it was converted, although the return on the writ is silent on the subject; because such evidence does not contradict the record, but shows what the true record ought to be.[5]

But the truth of the affidavit in the attachment can not be inquired into in a suit on an attachment bond brought for a failure to prosecute the attachment with effect.[6]

1. Baxley *v.* Segrest, 85 Ala, 183.

2. Gaddis *v.* Lord, 10 Iowa 141.

3. Under a bond conditioned to pay all damages in case the attachment plaintiff should fail to recover judgment in attachment, an action was begun. As evidence of a judgment in attachment, the justices' docket prepared for *judgments by confession* in attachment which should have been entered in the other docket where the commencement of the attachment suit was recorded, was introduced. A judgment in attachment was thereby proved. Hahn *v.* Seifert, 64 Mich. 647, 31 N. W. Rep. 564.

4. Drummond *v.* Stewart, 8 Iowa 341.

5. Hensley *v.* Rose, 76 Ala. 373.

Under the California code the return of a sheriff upon process is *prima facie* evidence of the facts therein stated. Hammond *v.* Starr, 21 Pac. Rep. 971, 79 Cal. 556.

6. Hayden *v.* Sample, 10 Mo. 215.

When an attachment has been dissolved on motion because the allegations in the affidavit were false, and because the case is one in which an attachment can not issue, the dissolution is conclusive in an action on an attachment bond, unless it has been reversed on error.[1]

And a discharge of an attachment on its merits is conclusive between the parties as to the fact that it issued without good cause; and that issue can not be retried in the action to recover damages for the wrongful seizure of the property.[2]

The judgment in the original suit is conclusive in a suit on the attachment bond, as to the amount of the defendant's indebtedness.[3] Therefore, when an action is brought against a surety on an attachment bond, which provides for the payment of all costs adjudged to defendant in attachment in case the same be wrongful, it can not be shown that certain items of costs and disbursements in the judgment were erroneously included therein.[4] In Alabama in a suit on an attachment bond, a judgment on a verdict against the plaintiff in the attachment suit is not conclusive that the attachment was not wrongfully sued out.[5] But in Arkansas where the affidavit for the attachment has been controverted and the issue determined in the defendant's favor, and the attachment has been thereupon discharged, such judgment will, in a suit on the bond against the principal and sureties, be conclusive as to the wrongful issuing of the writ.[6] But if such judgment has been rendered because of the *informality* of the bond, and not because of its *falsity*, this is not sufficient proof that the attachment was wrongfully sued out.[7]

However, in Louisiana it is said that courts should not aid either party to enforce an illegal contract, and therefore in an

1. Hoge *v.* Norton, 22 Kan. 374.

2. Mitchell *v.* Mattingly, 58 Ky. 237.

3. Gaddis *v.* Lord, 10 Ia. 141.

In Louisiana a judgment confessed by the principal after a cession, on a bond executed theretofore, does not bind the surety. Herrick *v.* Conant, 4 La. Ann. 276.

4. Drake *v.* Sworts, 24 Or. 198, 33 Pac. Rep. 563.

5. Sacket *v.* McCord, 23 Ala. 851.

6. Boatwright *v.* Stewart, 37 Ark. 614.

7. Boatwright *v.* Stewart, 37 Ark. 614.

action against the surety, the fact that judgment was rendered in the original suit for defendant will not alone be noticed; but the courts will also consider the reasons why it was rendered.[1] But the surety who attacks the validity of the judgment against defendant can not show, by the attorney who filed the answer, that he did so by mistake, and without authority, where the defendant is regularly in court, at least to the extent of the property attached, and he has neither appealed nor in any manner disapproved of the acts of the counsel representing him; he must be presumed to have been satisfied with the same.[2] Nor will sureties on the bond be allowed to contradict the recitals of their bond, after their liability has been fixed by judgment and a return of execution against their principal.[3]

§ 190. (i) **The recovery in an action for wrongful attachment.**—The amount which may be recovered in an action for the wrongful suing out of an attachment is dependent upon the *form* of the action as well as upon the *parties defendant*. If the action is brought on the *bond* the recovery will, in any event, be limited to the penalty named in the bond.[4] If it is

1. Clarke *v.* Scott, 2 La. Ann. 907.

2. Doane *v.* N. O. Telegraph Co., 11 La. Ann. 504.

It is the surety's duty to ascertain for himself who is the true principal in the bond. Therefore, when the principal named therein is the party, for whom he intended to become surety, and it proves to be in fact the bond of another party, by whom it is signed, the loss must fall upon the surety, for by his intervention plaintiff has been deprived of his recourse on the property. Neither can the surety avail himself of his own mistake as a ground for his release or of the property. Doane *v.* N. O. Telegraph Co., 11 La. Ann. 504.

Nor will he be permitted to aid in defeating the levy of the execution, and then set up the want of such levy as a ground for his discharge. Doane *v.* N. O. Telegraph Co., 11 La. Ann. 504.

3. Price *v.* Kennedy, 16 La. Ann. 78.

4. See *ante*, § 163; Sturgis *v.* Knapp, 33 Vt. 486.

One case in Iowa, however, holds that if the bond contains a stipulation for a reasonable attorney's fee as part of the costs, that fee may be allowed in addition to a judgment for the full penalty of the bond. Union Mercantile Co. *v.* Chandler, (Ia.) 57 N. W. Rep. 595.

When the principal has paid costs and expenses exceeding the penalty named in the undertaking, the sureties are discharged. Palmer *v.* Starbuck, (City Ct. N. Y.) 19 N. Y. S. 465.

brought against the attachment plaintiff alone, and *malice* is alleged and proved, exemplary damages may be awarded.[1] But the fact that the attachment was maliciously sued out will not effect the liability of the sureties because "motive" and "probable cause" are not applicable as to them.[2] If the action is not on the bond against the parties thereto, but at common law against the plaintiff, the amount of the penalty named in the bond is of course irrelevant, immaterial, and of no effect in limiting the amount of the recovery.[3]

The non-existence of indebtedness to the attachment plaintiff from the attachment defendant for which, and at the time, the attachment was sued out, primarily entitles such defendant to recover his actual damages.[4]

It is almost a universal rule that the wrongful suing out of the writ entitles the attachment defendant to recover damages without proof of malice, but when both the wrongful and malicious suing out of the attachment is alleged and proved, exemplary damages may also be recovered.[5] General rules for the recovery of damages in an action on the bond have been aptly given as follows: (1) The damages must be the natural and proximate consequence of the wrong done, and not the remote accidental result. (2) Special damages—or what are variously called "exemplary" "punitive" or "vindictive"

1. See below.

2. Elder *v.* Kutner, 97 Cal. 490, 32 Pac. Rep. 563; Dawson *v.* Baum, 3 Wash. T. 464, 19 Pac. Rep. 46.

3. See "Liability of the Plaintiff," *post*, § 357.

4. Tucker *v.* Adams, 52 Ala. 254; Lockhart *v.* Woods, 38 Ala. 631.

5. Pounds *v.* Hamner, 57 Ala. 342; Hays *v.* Anderson, 57 Ala. 374; Churchill *v.* Abraham, 22 Ill. 455; Floyd *v.* Hamilton, 33 Ala. 235; Myers *v.* Farrell, 47 Miss. 281; State *v.* Schobe, 23 Mo. App. 474; Moore *v.* Withenburg, 13 La. Ann. 22; Teal *v.* Lyons, 30 La. Ann., Part II, 1140; Harris *v.* Finberg, 46 Tex. 79; Braunsdorf *v.* Fellner, 76 Wis. 1; Dunning *v.* Humphrey, 24 Wend. (N. Y.) 31.

The improper suing out of an attachment when not wrongful, *i. e.*, where there was just grounds for bringing an attachment, seems not to be sufficient basis on which to recover even nominal damages. As where the attachment was abated on plea for a defect in the affidavit. Sharpe *v.* Hunter, 16 Ala. 765. But this is generally immaterial in the present practice, because the attachment plaintiff will, in all probability, cure such defect by amendment and sustain his attachment.

damages—can be recovered only when they are not too remote, and are specially declared on and claimed in the declaration, or complaint. (3) What are variously termed *speculative* damages,—possible or probable profits that it is claimed could have been realized but for the tortious act or breach of contract charged against the defendant,—are generally too remote and can not be recovered.[1]

In some states only such damages can be recovered as are strictly compensatory,[2] and the immediate consequences of the attachment.[3] Compensation includes reasonable costs and expenses in procuring the discharge of the attachment, but not injury to reputation, and not in Ohio to depreciation in value depending upon the opinion of witnesses.[4] Nor in Kentucky does it include injury to the debtor's credit, his sensibilities, his business, etc., the proper remedy for such being an action on the case.[5] And in Missouri the damages which result naturally and proximately from the attachment can alone be recovered.[6] Other states hold to a broader view as we will presently see and more specially when malice is alleged and proved.

The measure of damages to be recovered is in some states said to be only the actual expenses and loss resulting from the attachment.[7] And only such as are incurred in the defense of

1. Pollock *v.* Gantt, 69 Ala. 373. And the following cases hold to the same principle: Culver *v.* Hill, 68 Ala. 66; Bolling *v.* Tate, 65 Ala. 417; Higgins *v.* Mansfield, 62 Ala. 267; O'Grady *v.* Julian, 34 Ala. 88; Burton *v.* Holley, 29 Ala. 318; Sims *v.* Glazener, 14 Ala. 695; Donnell *v.* Jones, 13 Ala. 409; Doll *v.* Cooper, 9 Lea (Tenn.) 576.

But where the assignee of a copartnership on which the defendant was a member, has defended the attachment suit, and the principal has not, the expenses of the assignee in defending such suit can not be recovered in an action on the bond by the attachment creditors in the attachment proceeding. Weir *v.* Dustin, 32 Ill. App. 388.

2. Goodbar *v.* Lindsley, 51 Ark. 380.

3. Plumb *v.* Woodmansee, 34 Iowa 116; Myers *v.* Farrell, 47 Miss. 281.

4. Alexander *v.* Jacoby, 23 Ohio State 358.

5. Pettitt *v.* Mercer, 8 B. Mon. (Ky.) 51.

6. State *v.* Thomas, 19 Mo. 613.

7. Damron *v.* Sweetser, 16 Ill. App. 339; Howard *v.* Oppenheimer, 25 Md. 350.

the attachment,[1] or some proceeding connected therewith.[2] And no recovery can be had for costs and expenses incurred entirely in defending the main action.[3] Nor are the sureties on an attachment bond liable for the costs accruing on a trial of the right of property, between the plaintiff and a third person, who interposes a claim to the attached property.[4] In Nebraska, the sureties are liable for all damages which the defendant in the writ sustains, up to the time of re-delivery of the property to him on the dissolution of the attachment.[5] And in Missouri general damages are recoverable for the losses and expenses incurred "by reason of the attachment or any process or proceeding in the suit, or by reason of any judgment or process thereon" and losses and expenses suffered after the dismissal of the attachment may be recovered.[6] And under a condition to pay "all damages which may accrue to the defendant in consequence of the attachment," the recovery may include costs and expenses incurred by the trial of a plea in abatement to the affidavit.[7] A bond given by a party, on suing out an attachment from a justice's court, that he will pay all damages and costs if he fail to recover, extends to the final determination of the cause.[8] But, *quære*, should sureties be liable for costs and expenses made by an appeal to have the

1. Johnson v. Farmers' Bank, 67 Ky. 283; Norton v. Cammack, 10 La. Ann. 10.

Where, because of the peculiar circumstances of the case, a defendant banking corporation recovered in an action on the bond the interest which it lost on a deposit which was the subject of the attachment, see Northampton Nat. Bank v. Wylie, 4 N. Y. S. 907, 52 Hun 146, 16 Civil Proc. Rep. 326.

2. State v. Larabie, 25 Mo. App. 208.

Whether the attachment was dismissed or dissolved on a trial of the plea in abatement, the only damages recoverable are such as are connected with the attachment. State v. Larabie, 25 Mo. App. 208.

Costs in a justice's court are recoverable as part of the damages. Seay v. Greenwood, 21 Ala. 491.

3. Johnson v. Farmers' Bank, 67 Ky. (4 Bush) 283; White v. Wyley, 17 Ala. 167; Stauffer v. Garrison, 61 Miss. 67.

4. Thompson v. Gates, 18 Ala. 32.

5. McReady v. Rogers, 1 Neb. 124.

6. State v. Beldsmeier, 56 Mo. 226; State v. O'Neill, 4 Mo. App. 221.

7. Hayden v. Sample, 10 Mo. 215.

8. Ball v. Gardner, 21 Wend. (N. Y.) 270.

attachment reinstated?[1] Costs of an appeal have been awarded where the dismissal of the case below was sustained by the appeal, and the bond provided for the payment of all costs which might be awarded and all damages which might be sustained by reason of the attachment if the defendant should recover judgment, although the attachment was not vacated on motion, but by dismissal of the complaint.[2] And the costs of a *certiorari* have been recovered in an action on the bond as part of the damage sustained by the attachment.[3]

In some other states the sureties on an undertaking are liable not only for expenses incurred by the defendant on account of the attachment, but also for all costs and disbursements adjudged to him in the action.[4]

Attorneys' fees, which are reasonable for the services rendered and which were necessary in defending the attachment proceedings, may generally be recovered in an action on the bond as an item of actual damages,[5] when properly alleged in the plea,[6] even though the same be not yet paid to the attorneys.[7] But in general, only such as are the natural and direct consequence of the attachment,[8] and not such as were paid in defending the principal suit,[9] even though jurisdiction in the principal suit is obtained solely by attaching the property

1. Baare *v.* Armstrong, 62 How. (N. Y.) Pr. 515, s. c. 26 Hun (N. Y.)19.

2. Palmer *v.* Starbuck, (City Ct. N. Y.) 19 N. Y. S. 465.

3. Bennett *v.* Brown, 20 N. Y. 99.

4. Bing Gee *v.* Ah Jim, 7 Saw. 117; Drake *v.* Sworts, 24 Ore. 198, 33 Pac. Rep. 563; Greaves *v.* Newport, 41 Minn. 240, 42 N. W. Rep. 1059; Crandall *v.* Rickley, 25 Minn. 119.

5. Seay *v.* Greenwood, 21 Ala. 491; Higgins *v.* Mansfield, 62 Ala. 267; Behrens *v.* McKenzie, 23 Iowa 333; Selz *v.* Belden, 48 Iowa 451; Solomon *v.* McLennan, 81 Iowa 406, 46 N. W. Rep. 1083; Byford *v.* Girton, (Iowa) 57 N. W. Rep. 588; Lyman *v.* Lauderbaugh, 75 Iowa 481, 39N. W. Rep. 812; Swift *v.* Plessner, 39 Mich. 178; State *v.* McKeon, 25 Mo. App. 667; Raymond *v.* Green, 12 Neb. 215; Territory *v.* Rindscoff, 4 N. M. 363, 20 Pac. Rep. 180; Northrup *v.* Garrett, 17 Hun (N. Y.) 497; Northampton Nat. Bank *v.* Wylie, 52 Hun (N. Y. Supr.) 146; Jacobus *v.* Monongahela Nat. Bank, 35 Fed. Rep. 395; Buckley *v.* Van Diver, 70 Miss. 622, 12 So. Rep. 905; Byrne *v.* Gardner, 33 La. Ann. 6.

6. Vorse *v.* Phillips, 37 Iowa 428. See *ante*, § 187.

7. Raymond *v.* Green, 12 Neb. 215, s. c. 41 Am. Rep. 763.

8. Patton *v.* Garrett, 37 Ark. 605.

9. Damron *v.* Sweetser, 16 Bradw. (Ill.) 339; Trapnall *v.* McAfee, 3 Metc. (Ky.) 34; Porter *v.* Knight, 63 Iowa 365.

of a non-resident who subsequently appeared and put in a defense to the main action.[1] However, in Indiana, where both the action and the attachment have been defended, reasonable attorney's fees of the defendant in the action in which the attachment was sued out, as well as in the attachment proceeding itself, may be included in the damages.[2] And in Iowa, where the whole defense in the original case tended to show the wrongfulness of the attachment, it is held to be proper in an action on the bond to allow attorney's fees for services rendered in defending the entire case.[3] But in New York it has been held, that where the whole efforts of the defense were directed towards defeating the principal suit by showing that the plaintiff had no legal claim (no effort being made to set the attachment aside), counsel fees could not be recovered against the sureties on the ground that they were "damages sustained by reason of the attachment."[4] In Kansas it has been said to be a question for the jury to determine whether it was proper to employ counsel from another county, and if so, that the fees incurred thereby may be recovered in an action on the bond.[5]

In Tennessee, in an action brought upon a bond for the wrongful suing out of the attachment, although upon probable cause the plaintiff may recover costs paid by him, but not attorney's fees.[6] In New York, a statutory bond, by the conditions of which the sureties are bound to pay all costs which may be awarded to the defendant, and all damages sustained by reason of the attachment in case the defendant recovers judgment or the warrant is vacated, does not render the sureties liable for the expense paid the defendant for counsel fees, as a part of the costs.[7] In Texas no attorney's fees are recov-

1. Frost *v.* Jordan, 37 Minn. 544, 36 N. W. Rep. 713.

2. Wilson *v.* Root, 43 Ind. 486.

3. Whitney *v.* Brownewell, 71 Iowa 251, 32 N. W. Rep. 285.

If the bond stipulates that a reasonable attorney's fee may be recovered as part of the costs, such fee may be assessed as damages, in addition to the full penalty of the bond, and judgment entered for the full amount. Union Mercantile Co. *v.* Chandler, (Iowa) 57 N. W. Rep. 595.

4. Northampton Nat. Bank *v.* Wylie, 4 N. Y. S. 907, 52 Hun 146, 16 Civil Proc. R. 326.

5. Tyler *v.* Safford, 31 Kan. 608.

6. Littleton *v.* Frank, 2 Lea (Tenn.) 300.

7. Northampton Nat. Bank *v.* Wylie,

erable, although the attachment was wrongfully sued out, unless it was with malice and without probable cause.[1] And in Pennsylvania, in an action on a bond, conditioned to pay "such damage as the court may adjudge," no attorney's fees can be recovered except taxable fees.[2] And in California only taxable costs are recoverable.[3]

In Alabama, the plaintiff in a suit on an attachment bond, conditioned as required by the code, is not entitled to recover reasonable attorney's fees for bringing said suit.[4]

Expenses of traveling between the home of the attachment defendant and the place of trial incurred by reason of attending the attachment suit may be recovered,[5] and also the value of the time lost by such attachment defendant.[6]

In an action on the bond where the attachment was dismissed and the property returned after showing that it was wrongfully sued out, the measure of damages should be the loss sustained by being deprived of the use of the property, including waste and deterioration in value, together with expenses incurred in defending the attachment. And this is the rule, although the property consists in work animals, utensils and tools.[7] And where the property is returned on dismissal of the attachment, the measure in such case will be the market value of the use of the property during the time of its detention—not its value to the plaintiff.[8] But the damages recovered in an action on the bond can not exceed the injury occasioned by the party being deprived of the use of the property, or its loss, deterioration, or decline in value, with costs and expenses in defense of the suit.[9] The measure of damages for

4 N. Y. S. 907, 52 Hun 146, 16 Civil Proc. R. 326. But see Northrup *v.* Garrett, 17 Hun (N. Y.) 497.

1. Hughes *v.* Brooks, 36 Tex. 379.

2. Jacobus *v.* Monongahela Nat. Bank, 35 Fed. Rep. 395.

3. Heath *v.* Lent, 1 Cal. 410.

4. Copeland *v.* Cunningham, 63 Ala. 394. See, also, Watts *v.* Rice, 75 Ala. 289.

5. Tyler *v.* Safford, 31 Kan. 608; State *v.* Shobe, 23 Mo. App. 474; Higgins *v.* Mansfield, 62 Ala. 267.

6. Higgins *v.* Mansfield, 62 Ala. 267.

7. Boatwright *v.* Stewart, 37 Ark. 614; Sanford *v.* Willetts, 29 Kan. 647; Frankel *v.* Stern, 44 Cal. 168.

8. Hurd *v.* Barnhart, 53 Cal. 97.

9. Reidhar *v.* Berger, 8 B. Mon. (Ky.) 160.

To recover for further injury resort must be had to an action of the case.

the attachment of a stock of merchandise may legitimately include its deterioration in value during the time, and rent paid by the attachment defendant for the store building during the time the same was held under the writ.[1] The measure of damages for wrongfully suing out an attachment on a stock of goods was said to be the cost of replacing the goods at the place where they were levied upon.[2] Where cotton was seized on attachment, the depreciation in its value between the time of the seizure and the subsequent dissolution of the writ, was held to be the measure of damages sustained.[3] In one case where bonds were seized, and the same falling due, were sold for less than what might have been obtained for them had no seizure been made, the attachment plaintiff was adjudged, in an action for the wrongful attachment, to pay the actual damage caused thereby.[4]

When the wrongful attachment causes the entire loss of the property attached, and then only, the value of the property at the time of the attachment is to be considered in measuring the damages.[5] To the market value of the goods, at the time of the attachment, must then be added interest at the legal rate from the seizure to the time of the trial.[6] When the attachment has been wrongful and the property has been sold, the measure of damages will be the difference between the market

Reidbar *v.* Berger, 47 Ky. 160. And see succeeding paragraph of this section.

1. Lowenstein *v.* Monroe, 55 Iowa 82.

In this case, it is said that loss of profits or credit can not be recovered, because they belong to that class of remote and speculative damages which the jury can not consider. Lowenstein *v.* Monroe, 55 Iowa 82.

As to the recovery for loss of profits in an action for maliciously suing out the attachment, see below.

2. Selz *v.* Belden, 48 Iowa 451.

In this case for the wrongful suing out of the attachment, the jury were asked to determine whether or not the attachment was wrongful, and after the answer was given in the affirmative, evidence was then received to determine the extent of the damage, to fix the amount to be allowed. Selz *v.* Belden, 48 Iowa 451.

3. Fleming *v.* Bailey, 44 Miss. 132.

4. Horn *v.* Bayard, 11 Rob. (La.) 259.

5. Boatwright *v.* Stewart, 37 Ark. 614; Sanford *v.* Willetts, 29 Kan. 647.

6. Willis *v.* Lowry, 66 Tex. 540; State *v.* Gage, 52 Mo. App. 464; Blaul *v.* Tharp, 83 Iowa 665, 49 N. W. Rep. 1044.

value at the time of the attachment and the sum realized from the same.[1]

While the damage occasioned by the loss of business and credit because of an attachment is in most states too remote to be recovered in an action on the bond,[2] yet some states permit it.[3] In Mississippi it is said that loss of business caused by the seizure of goods may be a factor in computing the damages, when the same is shown as a matter of fact and not by the opinion or estimate of witnesses.[4] In Kentucky, one who has been prevented by an attachment upon his tools and materials from completing the work he has undertaken to do, is entitled to recover in an action on the bond consequential damages for the injury sustained.[5] But it does not include injury to the debtor's credit, his sensibilities, his business, etc., the proper remedy for such being an action on the case.[6] But Louisiana goes so far as to say that a recovery of damages may not only include pecuniary loss and expenses, but also mortification, annoyance and vexation caused by the defendant in the attachment.[7] But this is not the general rule, as will next appear.

Malice averred and proved, and that only, as a general rule, will entitle the plaintiff, in an action for wrongfully and maliciously suing out the attachment, to a recovery of exemplary damages. And exemplary damages are only recoverable to the extent that the attaching creditor has wantonly or maliciously resorted to the process with intent to injure the debtor.[8] And

1. Union Mercantile Co. *v.* Chandler, (Iowa) 57 N. W. Rep. 595; Ruthven *v.* Beckwith, (Iowa) 45 N. W. Rep. 1073. See 51 N. W. Rep. 153, 84 Iowa 715; Empire Mill Co. *v.* Lovell, 41 N. W. Rep. 583, 77 Iowa 100.

2. Holliday *v.* Cohen, 34 Ark. 707; Elder *v.* Kutner, 97 Cal. 490, 32 Pac. Rep. 563.

As to recovery in an action on the case see below.

3. Meyer *v.* Fagan, 34 Neb. 184, 51 N. W. Rep. 753; Seattle Crockery Co. *v.* Haley, 6 Wash. 302, 33 Pac. Rep. 650.

4. Marqueze *v.* Southeimer, 59 Miss. 430.

5. Carpenter *v.* Stevenson, 69 Ky. (6 Bush) 259.

6. Pettitt *v.* Mercer, 8 B. Mon. (Ky.) 51.

7. Byrne *v.* Gardner, 33 La. Ann. 6.

8. Accessory Transit Co. *v.* McCerren, 13 La. Ann. 214; Seattle Crockery Co. *v.* Haley, 6 Wash. 302, 33 Pac. Rep. 650; City Nat. Bank *v.* Jeffries, 73 Ala. 183; McCullough *v.* Walton, 11 Ala. 492; Offutt *v.* Edwards, 9 Rob. (La.) 90; Campbell *v.* Chamberlain, 10 Iowa 337; Plumb *v.* Woodmansee, 34 Iowa 116.

it must not be forgotten that no action can be maintained for maliciously suing out an attachment without showing that the attachment was wrongful as well as malicious and vexatious.[1] When the attachment is proven to have been wrongfully and maliciously sued out, the plaintiff may recover for his wounded feelings.[2] But the fact that the attachment creditor was actuated by malice toward some third person not a party to the process will not give ground for recovering vindictive damages, if it was not vexatious toward the defendant himself.[3]

While in most states injuries to credit or business occasioned by an attachment are too remote to be an item of recovery even when the attachment has been alleged and proven to be both wrongful and malicious,[4] yet the same is in some states allowed.[5]

But the better, and in some states the only, way to recover damages for injury to credit and prospective loss of profits in business is to bring an action on the case for maliciously suing out the attachment.[6]

Apt rules for the recovery of damages have been laid down in Tennessee, and they apply to exemplary as well as to actual damages. They are: (1) Loss by injury, detention or converting the property attached. (2) Loss by injury to plaintiff's business reputation and credit, as where he is thrown into bankruptcy by the attachment. (3) Vindictive damages based on falsity or *mala fides* of the claim, wanton abuse of the process or express malice in suing out, levying and continuing the attachment. And these three elements constitute the extent of

1. City Bank *v.* Jeffries, 73 Ala. 183; Helfrich *v.* Meyer, (Wash.) 39 Pac. Rep. 455.

Where the attachment is made on the advice of an attorney without his communicating the facts to the nonresident creditor the latter is not liable for vindictive damages. City Nat. Bank *v.* Jeffries, 73 Ala. 183.

2. Floyd *v.* Hamilton, 33 Ala. 235.

3. Wood *v.* Barker, 1 Ala. Sel. Cas. 311, 37 Ala. 60.

4. Campbell *v.* Chamberlain, 10 Iowa 337; Lowenstein *v.* Monroe, 55 Iowa 82.

5. Flournoy *v.* Lyon, 70 Ala. 308; Oberne *v.* Gaylord, 13 Ill. App. 30; Mayer *v.* Duke, 72 Tex. 445.

6. Holliday *v.* Cohen, 34 Ark. 707; State *v.* Thomas, 19 Mo. 613. See *post*, § 370.

the recovery in an action on the bond, as well as in an action at common law.[1]

Evidence in mitigation of damages may be introduced by the defendant in an action on an attachment bond; for example: where a second attachment has been made and sustained, and the same property appropriated to the satisfaction of the demand on which it was brought, as was seized under the first attachment (which was dismissed), the defendant may show the appropriation of the property on execution in the second attachment in reduction of damages.[2] But where the recovery sought is confined to the injury of the property, the existence of a legal right to attach it will not mitigate the damages.[3]

When may the jury be instructed to find for the plaintiff in the action? If the attachment plaintiff had no demand against the attachment defendant at the time of suing out the writ, the proceeding was, of course, wrongful.[4] Therefore when the evidence is such as to leave no room for controversy as to the right of recovery, and the jury are convinced by the evidence there was no debt, the court may charge the jury that "if they believed from the evidence that no demand in favor of the plaintiff in the attachment, against the defendant, existed at the time said attachment was sued out, then they must find for the plaintiff in this action."[5] When the verdict is rendered for a sum greater than that authorized by the evidence, the excess may be remitted.[6]

1. Doll *v.* Cooper, 77 Tenn. (9 Lea) 576.
2. Earl *v.* Spooner, 3 Denio (N. Y.) 246.
3. Lobenstein *v.* Hymson, 18 S. W. Rep. 250, 90 Tenn. 606.
4. Tucker *v.* Adams, 52 Ala. 254.
5. Lockhart *v.* Woods, 38 Ala. 631.
6. Kaufman *v.* Armstrong, 74 Tex. 65.

CHAPTER IX.

THE WRIT.

§ 191. The purpose of the writ.
192. When the writ to be issued.
193. Where the writ to issue.
194. By whom to be issued.
195. Order in which several writs must issue.
§ 196. Necessary formalities of the writ.
197. Amendment of the writ.
198. To whom issued and delivered —Several writs—*Alias* writs.
199. The effect of the writ.

§ 191. **The purpose of the writ.**—The purpose of the writ, or warrant of attachment, under the present prevailing practice in attachment proceedings is twofold. Its first object is to cite the defendant to appear in person and defend the action begun against him, and its second object is to create an immediate lien upon the defendant's property, to await and satisfy the judgment that may be thereinafter entered against him. Such is the purpose when attachment is sought at the inception of the suit. But when it is resorted to only as an ancillary remedy in suits already begun by personal service, it has but the latter object to attain, the former having already been accomplished by the summons previously issued. "Ancillary attachment," or, as it is sometimes called, "attachment in aid," will receive further consideration in a subsequent article.[1]

The purpose of the writ of attachment then is generally to institute a dual proceeding against the defendant. The first movement being directed toward obtaining a personal judgment against him, and the second movement being directed against his property to make it subservient to such judgment, and in case the first movement is unavailing, because of a failure to obtain the personal service as a summons, then to sub-

1. See *post*, § 215.

serve the satisfaction of the plaintiff's demand insomuch as the value of the property may be capable.

In case this dual purpose of the writ is attained, there may be both a personal judgment and a satisfaction thereof by *the thing*. But the accomplishment of either one is not essential to the other, for if the attachment fail in a suit in which there has been personal service (or voluntary appearance of the defendant which is equivalent thereto), a personal judgment may nevertheless be entered. In a case where there has been no personal service or voluntary appearance, yet if the seizure has been lawful, a judgment *in rem* may be entered and the property seized applied to the satisfaction of the defendant's indebtedness to the plaintiff.[1] If there be neither service upon the defendant nor on his property, no judgment can be obtained.[2]

Notwithstanding the diverse opinions that have been pronounced on the subject, it is now generally conceded that when the defendant is not personally served, and does not put in an appearance in answer to the publication, he is not personally in court, although the seizure of his property may have been legally perfected. In other words a *person* is not in court because his property is. And that in such a case the action becomes one purely *in rem*. And in consequence thereof the judgment thereafter obtained is not necessarily for the amount of the demand which the plaintiff may prove against the defendant, but must be a judgment against the property alone, and it will be subjected to the satisfaction of the defendant's indebtedness *pro tanto*, and the plaintiff will be left to resort to further proceedings for the remainder of his demand if any such there be.[3]

1. The seizure of the property, or obtaining possession of the *res*, is essential to the jurisdiction of the court. Bray *v.* McClury, 55 Mo. 128.

2. As an instance of the last condition, see West *v.* Schnebly, 54 Ill. 523.

3. See generally as to the parties to the writ. Saunders *v.* Columbia Life Ins. Co., 43 Miss. 583; Rankin *v.* Dulaney, 43 Miss. 197; Cooper *v.* Reynolds, 10 Wall. (U. S.) 308; Woolkins *v.* Haid, 49 Mich. 299; Elliott *v.* Stevens, 10 Ia. 418; Monroe *v.* Castleman, 3 A. K. Marsh. (Ky.) 399; Mixer *v.* Excelsior, etc., Co., 65 N. C. 552; Dean *v.* Massey, 7 Ala. 601; Thomp-

While the writ of attachment is sometimes held to not only serve the purpose of a process, but also that of a count or declaration,[1] yet the prevailing rule is that although an attachment is a proceeding *in rem*, the same forms of pleading must nevertheless be observed as in ordinary suits; that is to say, the plaintiff must file a declaration setting out the cause and nature of his demand before he can have judgment by default.[2] But in relation to this matter the practitioner is referred to a subsequent portion of this work in which will be considered "proceedings on return of the writ."

§ 192. **When the writ to be issued.**[3]—When the proper affidavit has been filed, and the necessary bond given and approved, the writ of attachment is issued as the next successive step in the proceeding. The importance of this being done in some states immediately after the making of the affidavit has been pointed out in relation to the time of making the affidavit.[4] The order in which these successive steps are to be taken must be observed, for if the writ should issue in advance of the filing of the affidavit and bond, or either of them, it will be void.[5] But where such preliminary papers have been handed to the clerk, away from his office, and the writ of attachment issued, although it is premature, the service and levy thereof becomes effectual and binding against the defendant and all others who have acquired no rights before the papers are actually lodged

son *v.* Baltimore, etc., Steam Co., 33 Md. 312; Stone *v.* Magruder, 10 Gill & J. (Md.) 383.

1. Moore *v.* Hawkins, 6 Dana (Ky.) 289.

2. Beck *v.* Irby, 36 Miss. 188.

3. In some states no writ of attachment is required, the simple "order" of attachment fulfilling the purpose thereof. Gutman *v.* Virginia Iron Co., 5 W. Va. 22.

4. See *ante*, § 128.

5. Eli *v.* Guest, 94 Pa. St. 160.

If the affidavit was made on the same day the writ issued, and purports to be annexed to the writ, it will be presumed that the writ did not pass from the clerk's hands until the affidavit was made, and it makes no difference whether or not the writ was filled out before the affidavit was made. Where two acts are done at the same time, that will take effect first which ought, in strictness, to have been done first, in order to give it effect. Hubbardston Lumber Co. *v.* Covert, 35 Mich. 254, and see also §§ 127 and 153, as to the "Affidavit and bond being a prerequisite to the issuance of the writ."

in the office.[1] When the statutory requirements of the filing of the affidavit and bond have been fulfilled, the writ will issue as a matter of course, and nothing more can be demanded until it does issue.[2]

It is not necessary that an action should be pending *before* an attachment writ issues. It may issue simultaneously with the summons in cases begun by summons, and the court will presume, *prima facie*, that the summons issued at or before the attachment.[3] And it may be levied upon the property of the debtor before a service of the summons.[4] But where the summons has been returned "not found," and the suit has been abated, the plaintiff can not thereafter sue out an attachment in the same case against the defendant as a non-resident, because, after abatement, no suit is pending in which an attachment can issue and such attachment would be consequently void.[5] In Nebraska, under a provision of the code that an attachment may issue after the commencement of a civil action for the recovery of money, and, after the filing of an affidavit and bond in the office of the clerk, the order of attachment to be made by the clerk, "in which the action is brought," it was held that upon the filing of an affidavit and bond in the district court, that court has jurisdiction to issue an attachment, although the action in which the attachment is sought was

1. People's Sav. Bank and Trust Co. *v.* Batchelder Egg Case Co., 51 Fed. R. 130, 2 Cir. Ct. App. 126, 4 U. S. App. 603; Bank of Helena *v.* Batchelder Egg Case Co., 51 Fed. Rep. 137, 2 Cir. Ct. App. 141, 4 U. S. App. 614; First Nat. Bank *v.* Batchelder Egg Case Co., 51 Fed. Rep. 137, 2 Cir. Ct. App. 142, 4 U. S. App. 615.

2. Griffith *v.* Robinson, 19 Tex. 219.

3. Blackman *v.* Wheaton, 13 Minn. 326; Schuster *v.* Rader, 13 Colo. 329, 22 Pac. Rep. 505; Central Sav. Bank Co. *v.* Langenbach, 1 Ohio N. P. 124.

4. Webb *v.* Bailey, 54 N. Y. 164. But it can not be issued before the summons. Kellar *v.* Stanley, 86 Ky. 240, 5 S. W. Rep. 477.

But when the court has no authority to issue an attachment, unless it has jurisdiction of the action, an attachment issued before the summons, and served at the same time with it, will be irregular and will be set aside. Fisher *v.* Curtis, 2 Sandf. (N.Y.) 660; White *v.* Johnson, (Ore.) 40 Pac. Rep. 511.

5. Steele *v.* Harkness, 9 W. Va. 13.

Under a statute providing that on a judgment which remained unsatisfied and in which an action has been returned "no goods," an attachment might issue "in the nature of an execution," the issuance and return of the execution was a condition precedent to the right to issue such attachment. Snyder *v.* Miller, (Pa.) 19 Atl. Rep. 309. Miller *v.* Snyder, 133 Pa. St. 23.

brought in a justice's court and is pending in the district court on proceedings in error.[1]

When it is necessary that certain facts must be proved in order to give the court jurisdiction to issue the process, such proof must be made and filed, for where there is a total defect in such proof, the process, if issued, will be void,[2] as has been before shown.[3] But although the statute require such proof, and that the clerk must judge of the sufficiency of the bond, as hereinbefore shown,[4] yet it is not essential that he should manifest his approval by a formal entry. His issuance of the process after the bond has been filed is a sufficient approval.[5] And a statement in the body of the writ that the bond has been *filed*, is equivalent to the statement that it has been approved.[6]

The writ of attachment can not be issued upon a Sunday. What is considered as comprising the "Lord's Day" is a question that has not been uniformly determined. It has been held to be the solar day;[7] but is generally conceded to comprise the intervening time between midnight preceding and midnight following the day that is termed Sunday.[8] And most states have statutes providing that the holding of court and the issuing of process within such time is illegal.[9] But the ques-

1. Strickler *v.* Hargis, 34 Neb. 468, 51 N. W. Rep. 1039.

2. Miller *v.* Brinkerhoff, 4 Denio (N. Y. Supr. Ct.) 118; Slaughter *v.* Bevans, 1 Pinney (Wis.) 348; Mayhew *v.* Dudley, (Wis.) 1 Pinney 95.

3. See *ante*, § 144.

4. See *ante*, § 176.

5. Griffith *v.* Robinson, 19 Tex. 219; Levi *v.* Darling, 28 Ind. 497; also *ante*, 176.

In Michigan it has been held, under a statute which provides that upon filing an affidavit for attachment with the clerk of court, "said clerk shall issue a writ of attachment," etc., that the issuance of an attachment creates a presumption that the proper affidavit was filed and that the mere facts that an affidavit, which was made and presented to the clerk, and received by him, does not bear his indorsement, and which, instead of keeping on file he attached it to the writ, with which it was afterwards returned to the clerk's custody, do not justify the exclusion of the affidavit and evidence when there is no question of identity. Beebe *v.* Morrell, 42 N. W. Rep. 1119, 76 Mich. 114.

6. Marnine *v.* Murphy, 8 Ind. 272.

7. Consult Fox *v.* Abel, 2 Conn. 541, which enters profoundly into the consideration of the question, and cites Coke on Litt., 135. See also Geer *v.* Putnam, 10 Mass. 312, note (a) and Delamater *v.* Miller, 1 Cowen (N. Y.) 75, note (a).

8. Tracy *v.* Jenks, 15 Pick. (Mass.) 465–567.

9. Consult your state statute or code.

tion relating to the service of a writ of attachment on Sunday will be considered hereinafter.[1]

§ 193. **Where the writ to issue.**—It seems almost needless to say that the writ must issue from a court having jurisdiction of the subject-matter, and yet this is a question that is frequently left without consideration until its full force is discerned through experience. The only safeguard is a positive knowledge of the provisions of the controlling statutes. While we have found no judicial determination in this regard, yet it would seem that inasmuch as the ordinary action of attachment is twofold in its nature, that insomuch as it is a personal action it is "transitory," and that in so far as it is an action *in rem* it is a "local" action. In other words, being a personal action it may be begun wherever service can be had upon the defendant; and being an action *in rem* the seizure must be made on a writ issuing from a court having jurisdiction of the *res*.[2] Where there is no personal service it must be prosecuted where the property is situate on which the action is founded.[3] Statutory requirements regarding the suing out of a writ of attachment must be strictly followed. An attachment against an absconding debtor can legally issue in Virginia only in the county where he last resided, or through which he is privately passing, or wherein he is absconding at the time of its being issued.[4] The statutory enactment in Michigan, requiring attachments to issue only to the court wherein one of the parties resides, if the debtor has property there, is jurisdictional and must be complied with, even though the property consists of an equity of redemption only and perhaps some personalty.[5] And under a provision of the New York code allowing attachment to issue out of the city court of New York against a domestic corporation whose place of business is within the city of New York, it becomes a question of fact whether the defend-

1. See *post*, § 205.
2. Hinman *v.* Rushmore, 27 Ill. 509.
3. Robinson *v.* National Bank, 81 N. Y. 385; Favrot *v.* Delle Paine, 4 La. Ann. 584.
4. Barnet *v.* Darnielle, 3 Call (Va.) 413.
5. Schloss *v.* Joslyn, 28 N. W. Rep. 96, 61 Mich. 267.

ant's place of business is in such city, and the recitals of the certificate of the incorporation are not conclusive of that fact.[1]

Two writs may issue at the same time in different counties.[2] But simultaneous and conflicting attachments will be subsequently considered.[3]

§ 194. **By whom to be issued.**—In most states the writ is issued by the clerk of the court to which the writ is made returnable and in which the matter will be determined. The issuance of the writ is an action judicial in its nature, whether it be done by the clerk alone or by direct order of the court.[4] It is an act by the court in the exercise of its jurisdiction. The statute directing the clerk to issue writs of attachment thereby invests him with sufficient judicial authority to do so, and this is done in most states, but in Minnesota, where the restrictions of the constitution of the state are such that judicial authority can not be delegated to a clerk, he is necessarily without power to issue writs of attachment until directed so to do by the court or judge.[5] A warrant issued by him without allowance by a judge is void, at least so far as the parties who procure its issuance are concerned.[6] The usual provisions of the statute, however, permit the clerk to issue a writ of attachment without any order from a judge directing him so to do.[7] When the

1. Blumenthal *v.* Hudson River, etc., Co., (City Ct. N. Y.) 15 N. Y. S. 826, 21 N. Y. C. Proc. 217; Rothschild *v.* Dithredge Flint Glass Co., (City Ct. N. Y.) 20 N. Y. S. 373, 22 Civil Proc. Rep. 314.

2. Morris *v.* Trustees, 15 Ill. 266.

3. See *post*.

4. The issue of an original attachment by a clerk is a judicial act, but its levy or service by a proper officer is a ministerial act. Matthews *v.* Ansley, 31 Ala. 20.

5. Morrison *v.* Lovejoy, 6 Minn. 183; Zimmerman *v.* Lamb, 7 Minn. 421; Guerin *v.* Hunt 8 Minn. 477.

6. Merrit *v.* St. Paul, 11 Minn. 223; Jacoby *v.* Drew, 11 Minn. 408.

7. In Texas the clerks of the courts have authority to issue writ of attachment in vacation and without an order of the court and judge. Byers *v.* Brannon, (Tex. Sup.) 19 S. W. Rep. 1091.

In Arkansas, where the clerk may issue the writ in the absence of the judge, an order made by the clerk, and directing himself to issue the writ is unnecessary, and the absence of an order of the court or judge is conclusive evidence that the clerk granted it himself. Baker *v.* Ayers, 25 S. W. Rep. 834, 58 Ark. 524.

In North Carolina attachment may be issued by a clerk of a county or superior court. Cherry *v.* Nelson, 7 Jones (N. C.) L. 141.

In Alabama the clerk of the circuit court may issue the writ in any civil

statute requires an order of the judge or court to authorize the clerk to issue writ of attachment, an issuance of the writ without such an order is not generally an exercise of jurisdiction, and the proceedings will be void.[1] But when attachment proceedings are permitted to be amended in matter of substance as well as in form at every stage of the case, and all errors or defects not injuriously affecting the substantial rights of the defendant will then be disregarded, an issuance of the writ by the clerk without the order from the judge will not be invalid, if amended in that particular.[2] Where the judge who has no clerk issues a writ of attachment himself, in a case commenced before him, it is not necessary to the validity of the writ that he should spread on his docket a formal order allowing the attachment. The issuing of the writ is itself the granting of the order.[3] And, under the Nebraska code, which

action commenced by attachment, and for the collection of "any money demand," the amount of which can be certainly ascertained. In actions to recover "damages for a breach of a contract when the damages are not certain or liquidated," or when "the action sounds in damages merely," the judge or chancellor only can issue the attachment. But this does not deprive the clerk of authority to issue an attachment in an action to recover damages for the removal of four bales of cotton on which the plaintiff holds a landlord's lien for rent and advances. Atkinson *v.* James, 96 Ala. 214, 10 So. Rep. 846.

The clerk of the city court of Mobile has no power to issue original attachments. Matthews *v.* Sands, 29 Ala. 136. And see further as to the authority of clerks in Alabama, Goldsmith *v.* Stetson, 39 Ala. 183.

1. Howell *v.* Muskegon Circuit Judge, 50 N. W. Rep. 308, 88 Mich. 369; Ostertoch *v.* Lent, 1 Hilt. (N.Y.) 158; Morrison *v.* Lovejoy, 6 Minn. 183; Guerin *v.* Hunt, 8 Minn. 477; Goldsmith *v.* Stetson, 39 Ala. 183; Lewis *v.* Dubose, 29 Ala. 219; Philpott *v.* Newman, 11 Neb. 299; Greenvault *v.* F. & M. Bank, 2 Doug. (Mich.) 498; Smith *v.* Greenleaf, 4 Har. & M. (Md.) 291.

2. People's Sav. Bank, etc., Co. *v.* Batcheldor, etc., Co., 51 Fed. Rep. 130, 2 Cir. Ct. App. 126, 4 U. S. App. 603; Bank of Helena *v.* Batchelder, 51 Fed. Rep. 137, 2 Cir. Ct. App. 141, 4 U. S. App. 614; First Nat. Bank *v.* Batchelder, 51 Fed. Rep. 138, 2 Cir. Ct. App. 142, 4 U. S. App. 615.

And if a statute requiring the judge to indorse an order and the clerk to issue the writ be amended so as to confer upon the clerk the same authority the judge had before such amendment, it is thereafter necessary for the clerk to indorse such order, specifying the amount for which it is to be allowed, whenever he exercises such judicial function of allowing it. Same cases.

3. Winchell *v.* McKinzie, 53 N. W. Rep. 975, 35 Neb. 813.

provides that the judge of the court in which the action is brought grant an attachment, where the probate judge of the county grants an attachment on a debt not due, and signs the order officially, it will be presumed that he is judge of the county where the order was made, and that the judge of the district court was absent from such county.[1] In Georgia, a justice of the inferior court may issue an attachment returnable to the supreme court.[2] And a notary public may also issue a writ of attachment.[3]

Where the clerk has the power to approve the bond and issue a writ of attachment, his deputy clerk may do the same.[4] And where the writ is issued by a deputy clerk who has not taken the oath, it is not thereby voidable, nor subject to be abated on plea, because his actions, like those of any other officer *de facto* have the same force, so far as the public and third persons are concerned, as the acts of the officer *de jure*.[5]

§ 195. **Order in which several writs must issue.**—It is the duty of the clerk to issue writs in the order in which they are applied for, but if the party making the first demand is not in attendance, the clerk need not delay the issuing of other writs against the same party.[6]

§ 196. **Necessary formalities of the writ.**—In view of the fact that the plaintiff in attachment may desire to take a judgment *in rem*, and of the fact that the defendant may not put in a personal appearance, which, if put in might, by the fact of such appearance, cure any defects in the plaintiff's pleading, extraordinary care should be taken by the plaintiff in having the writ of attachment, as well as all other preliminary papers, accurately drawn and fully within the statutory requirements

1. Reed *v.* Bagley, 24 Neb. 332, 38 N. W. Rep. 827.

2. Wanet *v.* Corbet, 13 Ga. 441.

3. Georgia Ice Co. *v.* Porter, 70 Ga. 637.

And this though his employer may be interested in the event of the suit. Georgia Ice Co. *v.* Porter, 70 Ga. 637.

4. Finn *v.* Rose, 12 Iowa 565; Wimberly *v.* Boland (Miss.) 16 So. Rep. 905.

5. Joseph *v.* Cawthorn, 74 Ala. 411.

6. Lick *v.* Madden, 36 Cal. 208.

so that if a final judgment is entered and the property sold, the purchaser may get an indefeasible title.[1]

The formal requisites of a writ of attachment vary under the different state systems, but, as a general rule, it must run in the name of the state and should be directed to the sheriff of the county where the property is situated and should command him to make the attachment.[2] But, if wrongfully directed, the sheriff should have the clerk to correct it, or if it be undoubtedly meant for him and he goes on and makes a levy, his action will be sustained.[3] In states, like New York and West Virginia, where attachment is considered a provisional remedy or

1. When an action is begun in a justice's court in Minnesota, the writ will be sufficient to give jurisdiction if it be in the form prescribed by statute, requiring defendant to be summoned to appear at the office of the justice of a specified county, even though the town be not named. Beseman *v.* Weber, 53 Minn. 174, 54 N. W. Rep. 1053.

In Kentucky it has been held that an attachment can not issue on the return of a *capias*, unless it be in the form prescribed by law. Irons *v.* Allen, Hard. (Ky.) 44.

2. Sims *v.* Bank of Charleston, 3 W. Va. 415.

In *Nebraska*, if the writ does not run to "The people of the state of Nebraska," as required by the constitution, the defect may be cured by amendment. Livingston *v.* Coe, 4 Neb. 379.

In Kentucky the attachment must run in the name of the commonwealth, otherwise the proceedings will be reversed. McDaniel *v.* Sappington, Hard. (Ky.) 94. And if a summons issue in the name of the commonwealth, and signed by the clerk, an order of attachment on the back, also signed by the clerk, which order when read by itself was not issued in the name of the commonwealth, the summons and indorsements will be read together, as forming one writ, issuing in the name of the commonwealth. Northern Bank *v.* Hunt's Heirs, 93 Ky. 67, 19 S. W. Rep. 3.

A writ directed to "All constables and sheriffs in the commonwealth of Kentucky," is good, where the debt is not over $50, and is returnable before the justice who issued it, or before any other justice in the county. Smith *v.* Terrill, 14 B. Mon. (Ky.) 256.

3. Warren *v.* Purtell, 63 Ga. 428. See Brown *v.* Neale, 3 Allen (Mass.) 74.

In Alabama a statute provided that writs of attachment must be directed to "any sheriff in the state of Alabama," and be in any form prescribed therein, but that no objection shall be taken for any defect in form if the essential matters are set forth. A writ which was improperly directed "to the sheriff or any constable of said county," was properly amendable on the trial, because of a statute which provided that such writs might be amended for any defect in form or substance before or during the trial. Harring *v.* Kelly, 96 Ala. 559, 11 So. Rep. 600.

auxiliary process, and being altogether the creature of legislation, it may run in any form or style the legislature may choose to prescribe.[1] And the controlling statute should be consulted as to the form of the writ required.

A writ of attachment ought regularly to be issued as of the term at which it was awarded, and must be made returnable within the time prescribed by the statute. However, if made returnable at a day earlier than by law is warranted, it is not void but merely voidable.[2] Neither is a writ of attachment, which is returnable to the second term of court after its date void, at least in Colorado. The writ may be amended in this regard.[3] But an attachment is void if made on a writ returnable, by mistake, to a term of court which is passed.[4] In North Carolina the writ need not contain any special day of return. It conforms to the statute if made returnable within thirty days from its date.[5] Writs of attachment need not in all cases be

1. Gutman *v.* Virginia Iron Co., 5 W. Va. 22.

2. Barney *v.* Patterson, 6 Har. & J. (1 Md.) 182; Bank of Missouri *v.* Matson, 26 Mo. 243.

The words "S. J. C., August term, Kennedec county, 1856," sufficiently shows to what court and term the writ is returnable. Lincoln *v.* Strickland, 51 Me. 321.

3. Archibald *v.* Thompson, 2 Col. T. 388. See Casey *v.* Wiley, 5 Ga. 333.

In Iowa the making of a writ returnable by the first day of the first term is surplusage, and the writ will be valid though it is omitted. Westphal *v.* Sherwood, 69 Iowa 364.

In Illinois, when ten days do not intervene between the commencement of the suit and the first day of the court, the plaintiff has his election to have it made returnable to the next term or any succeeding term to be holden within three months. If, however, it is made returnable to the first term, the case will be continued. Mechanics' Sav. Bank *v.* Givens, 82 Ill. 157.

In Pennsylvania the plaintiff may have his election to make his writ returnable the first Monday of the next term or on the fourth Monday of an intermediate month. Starbird *v.* Koonse, (Pa. Com. Pl.) 10 Pa. Co. Ct. Rep. 449.

4. Dame *v.* Fales, 3 N. H. 70; Holzman *v.* Martinez, 2 N. Mexico 271.

5. Hiatt *v.* Simpson, 13 Ired. (N. C.) L. 72.

In New Hampshire, a writ issued from the supreme judicial court, dated May 25, and near the time the defendant's property was attached, was made returnable to the supreme judicial court at the October term, but the supreme judicial court was abolished in August and its jurisdiction at trial terms conferred upon the circuit court. The circuit court held the writ to be sufficient in form, and sustained the attachment. Jenkins *v.* Sherburne, 56 N. H. 17.

made returnable to the courts which issued them. In Georgia, for example, officers authorized to issue process of attachment in one county may make them returnable to the courts of another county.[1] The rule governing the return of writs of attachment differs in some particulars from that controlling the return of other writs, as will be made to appear under the subject of "return."[2]

The date of the writ is also a matter of importance, because if the date of the writ is subsequent to the date of the officer's return of the attachment thereon, the attachment is void.[3] But a statute requiring an attachment to be dated on the day it was issued was complied with sufficiently when the date of the issue was indorsed on an attachment, although it was attested as of a former term. The attestation was rejected as surplusage.[4] And where the attachment shows the date of its issuance, a blank date in the clerk's attestation may be filled on motion.[5]

The names of the parties to the suit should appear in the writ. In Mississippi, where the affidavit described the debtors as A, B, C and D, trustees, and the writ recited A, B and C, surviving trustees, the variance was said to be immaterial.[6] And a writ in the form of a trustee process is valid and will authorize an attachment, although no trustee is named therein.[7] This is also true in many other states, as will be shown when we consider the subject of "writs of garnishment."[8] In New Hampshire a writ of foreign attachment, although in its form a joint process, is, in its character, objects and proceedings, and, in its legal construction, to be regarded as a several process as against the principal defendant and the trustee (garnishee). And it is to be regarded as a several process as against

1. Cox *v.* Felder, 36 Ga. 597.

2. See *post*, § 223.

3 Berry *v.* Spear, 13 Me. 187.

4. Swan *v.* Roberts, 2 Coldw. (Tenn.) 153.

5. Brack *v.* McMahan, 61 Tex. 1.

6. Clanton *v.* Laird, 12 S. & M. (Miss.) 568.

May be identified by referring to affidavit and bond. Moore *v.* Brewer, 95 Ga. 260.

7. Badlam *v.* Tucker, 1 Pick. (Mass.) 389.

8. See *post*, Vol. II.

In Maryland a short note in attachment is fatally defective if it does not set out individual names of the members of the firm in whose favor the attachment is issued. Hirsh *v.* Thurber, 54 Md. 210.

each of the several trustees (garnishees), unless they are expressly charged in the declaration as joint trustees.[1] Where the name of the party against whom the writ of attachment issued is fictitious on the face thereof, the writ will be void and the officer who executes it will be equally liable with the attaching creditor, notwithstanding the fact that the evidence shows clearly that the party against whom it was intended to proceed by attachment is the owner of the property taken.[2] Slight clerical errors in the names of the parties, such as the omission of a letter or the insertion of one when no one can fail to apprehend the meaning, may be corrected after the levy.[3] And a misnomer may be disregarded when the sense is apparent.[4] But whether a misnomer can be corrected or not, after the execution of the writ, depends largely upon the question whether the rights of the defendant or third persons would be impaired. If they would, the error in name is not then amendable.[5]

The *necessary recitals* in the writ differ in different states. When the statute requires that the ground for attachment must be inserted, the recitals thereof should correspond with those in the affidavit. If they are materially variant they may prove fatal.[6] But a misrecital in this regard will not in all states make the writ void. It may be voidable only.[7] Whether void or voidable only depends upon the liberality of the con-

1. Ingraham *v.* Olcock, 14 N. H. 243.

If they are not expressly declared against as joint trustees, each is entitled to make all legal defense, to which he would, by law, be entitled if he were alone declared against. Ingraham *v.* Olcock, 14 N. H. 243. See further as to "garnishment," the succeeding volume.

2. Patrick *v.* Solinger, 9 Daly (N. Y.) 149.

3. Wellover *v.* Soule, 30 Mich. 481; Wight *v.* Hale, 2 Cush. (Mass.) 486.

4. Lovelady *v.* Harkins, 14 Miss. 412.

5. Flood *v.* Randall, 72 Me. 439; Dutton *v.* Simmons, 65 Me. 583.

6. Woodley *v.* Shirley, Minor (Ala.) 14; Kennedy *v.* California Sav. Bank, 97 Cal. 93, 31 Pac. Rep. 846; Cronin *v.* Crooks, 143 N.Y. 352, 38 N. E. Rep. 368.

Under a statute requiring only that the warrant (writ) of attachment "briefly recite the grounds of the attachment," a recital in the writ that the defendant "has absconded from," etc., sufficiently follows the averment in the affidavit that the defendant had "departed from," etc. Van Camp *v.* Searly, (Sup.) 29 N. Y. S. 757.

7. Lovelady *v.* Harkins, 14 Miss. 412.

trolling statute of amendments. In Alabama, by force of the statute, "no objection shall be taken for any defect in form if the essential matters are set forth."[1] But in New York, the provision of the code that the warrant of attachment shall briefly recite the grounds of attachment is mandatory. Therefore the omission of such requirements are not mere irregularities, that can be cured by amendment, but fatal defects.[2]

The nature of the demand, at least, should be stated so specifically that a recovery thereon will bar a subsequent demand for the same cause.[3]

The necessity of a precise statement in the writ, of the *amount and nature* of the plaintiff's demand, depends largely upon the fact whether or not a further declaration is to be filed in the case. In West Virginia the issuance of a writ stating a larger amount than that named in the affidavit will be error which can not be corrected on motion, and is ground for quashing the writ.[4] In California the code requires a writ of

1. Blair *v.* Miller, 42 Ala. 308. See, also, Bruner *v.* Kinsel, 42 Ala. 493.

2. MacDonald *v.* Kieferdorf, (Com. Pl. N. Y.) 18 N. Y. S. 763, 22 Civil Proc. 105.

Under it a warrant of attachment which merely recited that "defendant has departed from the city and state of New York," when the same is not specified by the statute as a ground for attachment, rendered the writ void. McDonald *v.* Kieferdorf, (Com. Pl. N. Y.) 18 N. Y. S. 763, 22 Civil Proc. 105.

Nor was it a compliance with such requirement when the writ recited that it appeared by the affidavit of the plaintiff that "defendant has removed or is about to remove his property from the state, with intent to defraud, etc., or has assigned, disposed of or secreted" his property with like intent. The statement being in the alternative, the writ failed to recite briefly the grounds for attachment. Dintruff *v.* Tuthill, (Sup.) 17 N. Y. S. 556, 62 Hun (N. Y.) 591.

In Tennessee an attachment of land recited "that the oath having been made that the said defendant hath absconded, or so conceals himself from said county that the ordinary process of law can not be served upon him," etc. This was held insufficient to authorize the issuing of an attachment, and such attachment having issued, all proceedings under it were void. Conrad *v.* McGee, 9 Yerg. (Tenn.) 428. See, also, "Alternative statement of grounds far attachment" in the affidavit, *ante*, § 146.

3. Hickman *v.* Gest, Sneed (Ky.) 297.

4. Ballard *v.* Great Western Mining and Manuf'g Co., (W. Va.) 19 S. E. Rep. 510.

In Massachusetts it has not been necessary to a valid attachment that a declaration, or any description of the cause of action on which it is intended to declare, be inserted in the writ or filed before the return-day, except in cases when an arrest of the person was

attachment to state "the amount" of the plaintiff's demand, but the addition of the words "or thereabouts," after the amount of the demand in the writ of attachment, does not render the proceeding void on collateral attack.[1] And in Minnesota a slight discrepancy between the amounts stated in the warrant and those contained in the complaint (affidavit), will not affect the validity of a lien secured under it, in a collateral proceeding.[2] In Maine the statute provides that the

to be made. Binney *v.* Globe Nat. Bank, 23 N. E. Rep. 380, 150 Mass. 574.

In Georgia where the clerk failed to attach the process to the declaration and it was served alone, an amendment was allowed at a subsequent term, by attaching process and ordering service. Scarborough *v.* Hall, 67 Ga. 576.

1. Davis *v.* Baker, 25 Pac. Rep. 1108, 88 Cal. 106.

2. Shaubhut *v.* Hilton, 7 Minn. 506.

An affidavit for an attachment stated the amount of the indebtedness to be $923, with interest from a certain day. The writ and published notice stated only $923, omitting any allusion to interest. Default judgment was entered in favor of plaintiff for the debt and interest, as stated in the affidavit. It could not be reduced by *remittitur* to the amount stated in the writ and notice, because the record must show that the merits as to the residue, after the *remittitur*, are with the plaintiff, and this could not appear on a default, after publication only. Cohen *v.* Smith, 33 Ill. App. 344.

In Iowa the statute provides that the petition (affidavit) of a demand founded on contract, must state as nearly as practicable the amount due; and states that the amount thus sworn to is intended as a guide to the sheriff, who must, as far as circumstances will permit, levy on property 50 per cent. greater in value than that amount. The petition stated that $3,700 was due on notes, and asked for that amount, with interest, costs, and attorney's fee. The writ directed the sheriff to make an attachment to satisfy $3,700, with interest, attorney's fee and costs. The writ was not indefinite as to the amount to be attached, which was to be based on the $3,700 sworn to as due. Toledo Sav. Bank *v.* Johnston, (Iowa) 57 N. W. Rep. 622.

In a case in New York plaintiff's affidavit in attachment against nonresident defendants claimed $1,250. It appeared from the complaint and contract annexed, that the plaintiff was to receive from defendant a royalty of 20 per cent. on sales of a patented article, and at least $1,000 per annum. The complaint showed that the $1,000 was due, and averred that there was due the further sum of $250 for royalties. $1,250 was sufficiently shown to be due without averring a rendition of an account to defendants for the $250 royalties. Sperry *v.* Fox, (Sup.) 17 N. Y. S. 740, 63 Hun (N.Y.) 627.

In Missouri an averment in an attachment suit before a justice of the peace "that the defendants were tenants under a lease, and as such tenants failed to account to plaintiff for the rent * * * and as the tenants of the plaintiff defendants owe and are justly indebted to the plaintiff

writ must affirmatively and distinctively state all the elements material to the plaintiff's case.[1] And no attachment of real estate can be made on a writ containing simply a count for money had and received, without any specification of the claim to be proved under it.[2] Consequently an attachment of real estate upon a writ containing a count upon a promissory note, and a general count in which there is no specification of the claim to be proved under it, is void and can not be made valid by any subsequent amendment of the writ.[3] No attachment should issue for a larger amount than that sworn to in the affidavit or complaint.[4]

Where it is not expressly so required by the statute, a writ of attachment need not recite the making of the affidavit and bond required by the plaintiff.[5] The attachment statutes in general do not contemplate that the affidavit shall be annexed to the writ,[6] *the filing* of the affidavit and bond with the clerk being the general practice.[7] And where the statute requires that an order of attachment must be made, it is not generally necessary that such order recite that an affidavit has been filed

for said rent in the sum of $100, and for molasses the sum of $320," was indefinite in not stating the year for which the rent accrued, the land in respects of which it accrued, or the terms of the contract of renting, yet it was sufficient to confer jurisdiction. Holman *v.* Kerr, 44 Mo. App. 481.

In Texas, if the clerk has omitted to fill out the blank in the writ with the amount of the demand, the attachment may be ineffectual as to third persons, yet as between the parties, and in a case where the possession of the property already in the hands of the sheriff under prior attachments, not interfered with, the writ may be amended after levy. Munzenheimer *v.* Manhattan Cloak & Suit Co., 15 S. W. Rep. 389.

1. Herrick *v.* Osborne, 39 Me. 231.

A declaration was held insufficient because it did not allege that the defendant did knowingly aid and assist in the fraudulent proceeding and transfer of the property of the debtor which was liable to seizure by attachment or levy on execution by the plaintiff, that being the ground for the plaintiff's action. Herrick *v.* Osborne, 39 Me. 231.

2. Shaw *v.* Nickerson, 60 Me. 249.

3. Drew *v.* Alfred Bank, 55 Me. 450; Phillips *v.* Pearson, 55 Me. 570.

4. Reed *v.* Bank of Kentucky, 5 Blackf. (Ind.) 227.

5. Tanner & Delaney Engine Co. *v.* Hall, 22 Fla. 391; Hays *v.* Gorby, 3 Ia. 203; Ellsworth *v.* Moore, 5 Ia. 486.

6. Burnside *v.* Davis, 65 Mich. 74, 31 N. W. Rep. 619.

7. But see Simpson *v.* Oldham, 2 Chand. (Wis.) 129.

or to refer to any affidavit. If it sufficiently appears by the record that a sufficient affidavit was filed by the plaintiff with the clerk when the order of attachment was issued, the order of attachment being otherwise sufficient is good.[1] And unless the statute specifically so requires, it is unnecessary that the writ should recite on its face that an order was made for its issuance.[2]

In Mississippi, where duplicate writs of attachment may be issued, it is not necessary that they should have an indorsement setting forth that they are such duplicates.[3]

The writ must be signed and sealed by the clerk or other officer who issues it. A writ of attachment, which, though regular in other respects, yet wants the signature of the clerk, will be quashed on motion interposed in due season, whether it be considered simply irregular or absolutely void; for, if it be merely defective, it is no process at all unless amended, and is subject to be quashed.[4] And, under some statutes, the failure of the clerk to sign is an error that can not be cured by amendment. Such omission will render the whole proceedings void.[5] And this is true of the lack of a seal under some statutes. In Iowa the omission of a seal is a defect that can not be cured by amendment. It renders the writ absolutely void.[6] The issuance of a writ from the circuit court having the seal of the district court is the same as having no seal.[7] In Minnesota a writ signed by the judge of the district court, but not signed by the clerk nor sealed, is void.[8] In Texas a process issued by

1. King *v.* Board, 7 W. Va. 701.

2. Armstrong *v.* Lynch, 29 Neb. 87, 45 N. W. Rep. 274.

3. Saunders *v.* Columbus, etc., Ins. Co., 43 Miss. 583.

4. Smith *v.* Hackley, 44 Mo. App. 614.

5. Wiley *v.* Bennett, 9 Bax. (Tenn.) 581.

6. Shaffer *v.* Sundwall, 33 Ia. 579. The lack of a seal to a writ issuing from the marine court of New York is a mere irregularity curable by amendment. Tallcott *v.* Rosenberg, 8 Abb. (N. Y.) Pr. N. S. 287.

When has no seal see Wehrman *v.* Conklin, 155 U. S. 314.

7. Shaffer *v.* Sundwall, 33 Ia. 579. But may be corrected by amendment. Murdough *v.* McPherrin, 49 Ia. 479.

8. Wheaton *v.* Thompson, 20 Minn. 196.

Before November, 1866, the writ issued by a court commissioner in Minnesota was required to be signed by the clerk, sealed with the seal of the court, otherwise it was void. O'Farrell *v.* Heard, 22 Minn. 189.

the judge of the district court, and signed by the judge instead of the clerk, is valid.[1] In one case, under a statute requiring the process to be signed by the judge granting it, it was held not to be essential that the copy served should have a copy of the judge's signature subscribed to it.[2] But under a Wisconsin statute which requires the courts to disregard any errors not affecting substantial right, and giving them power to amend any process by correcting mistakes at any stage of the proceedings, and providing for the amendment of any process when the defect is not prejudicial, and that no writ shall be abated or quashed for want of form, it was held in the United States court, in a case properly removed thereto, that where a seal was omitted by mistake from a writ of attachment issued in the state court, the federal court would regard the writ as amended in that particular, as it would have been so amendable under the state laws.[3] However, in Nebraska, where a county judge made an order granting an attachment in an action to be brought in the district court of the county and signed the same officially, but failed to attach the seal of the county court, and the order was filed with the clerk of the district court and he issued a writ of attachment thereon, it was said the omission of the seal did not make the order absolutely void, and that the objection could not be raised by third parties in a collateral proceeding.[4]

§ 197. **Amendment of the writ.**—Whether or not a writ of

1. Sutherland *v.* De Leon, 1 Tex. 250.

2. Greenleaf *v.* Munford, 19 Abb. (N.Y.) Pr. 469, 30 How.(N.Y.) Pr. 30.

The omission of the signature of the attorney to a writ of attachment, issued under the code, as a provisional remedy, may be amended. Kissam *v.* Marshall, 10 Abb. (N. Y.) Pr. 424.

A justice's jurisdiction is special and limited and he must strictly pursue the authority given him. Therefore, attachments must issue under his seal, and it must appear that the debt was sworn to when such is the provision of the statute. Walker *v.* Wynne, 3 Yerger (Tenn.) 62; McCulloch *v.* Foster, 4 Yerger (Tenn.) 162.

An attachment issued by a justice of the peace is good, although signed by his name merely, without the words justice of the peace, or the initials, "J. P." Henderson *v.* Pitman, 20 Ga. 735.

3. Wolf *v.* Cook, 40 Fed. Rep. 432.

4. Winchell *v.* McKenzie, 53 N. W. Rep. 975, 35 Neb. 813.

attachment may be amended depends wholly upon the controlling statute of amendments. And the rules hereinbefore laid down in regard to the amendment of the affidavit will be found to be generally true in regard to the amendment of writs of attachment.[1] But whether the defect is amendable or not, always depends upon the question whether such defect renders the proceedings under the writ absolutely void or whether they are voidable only. If the former, of course there can be no amendment, but if the latter, the writ is generally amendable. But an amendment of the writ will not be permitted, when it would be prejudicial to the rights of third parties.[2] Amendments are intended for the curing of clerical errors and the question of allowing them is directed to the sound discretion of the court.[3] In Iowa, no attachment will be dismissed or quashed if the defect in the petition, bond, or writ can be amended so as to show that legal cause for the attachment existed.[4] Illinois and other states have similar statutes. A party desiring to have an irregularity in an attachment corrected, must either proceed to that end at the earliest opportunity or offer a reasonable excuse for not having done so.[5] The writ is sometimes amendable after the levy, as in Iowa.[6] And in Georgia, when the levy was made by the proper officer, any mistake in directing it is amendable. Therefore neither the writ nor the levy is void for a misdirection of the process.[7]

The names of the parties are subject to amendment within certain limitations. In Alabama, where an attachment is sued

1. See *ante*, § 187.

2. Greenvault *v.* F. & M. Bank, 2 Doug. (Mich.) 498; Clawson *v.* Sutton Gold Mining Co., 3 S. C. 419.

Leave was granted to amend a writ of attachment and *capias*, under the act of Maryland of 1795, before condemnation. Birch *v.* Butler, 1 Cranch (U. S.) C. Ct. 319.

3. Cartwright *v.* Chabert, 3 Tex. 261; Lee *v.* Smyser, (Ky.) 29 S. W. Rep. 27.

4. Rock Island Plow Co. *v.* Breese, 83 Iowa 553, 49 N. W. Rep. 1026; Robinson *v.* Breese, 83 Iowa 553, 49 N. W. Rep. 1026.

Under this statute an attachment was held to be void because the writ recited that the petition was filed in the "circuit court," and ordered the sheriff to make the return to that court, when in fact it was filed in the district court, the circuit court being then abolished. Robinson *v.* Breeze, 83 Iowa 553, 49 N. W. Rep. 1026.

5. Smith *v.* Walker, 6 Rich. (S. C.) 169.

6. Atkinson *v.* Womeldorf, 53 Iowa 150.

7. Warren *v.* Purtell, 63 Ga. 428.

out and the names of the plaintiffs no where stated, the affidavit, bond and writ may be amended on motion so as to set out their names.[1] In Massachusetts a writ has been amended after attachment, by substituting "Wright" for "Wight," as the name of one of the plaintiffs, without vacating the attachment.[2] And the amendment of the writ, by changing the name of the plaintiff "Mary Cain" to "Ann Cain" does not vacate an attachment of funds in the hands of persons summoned as trustee so as to give an assignment to a third person, made before the amendment, preference over the attachment.[3] Nor does the insertion of a middle initial in the name of a party.[4] Nor is a lien created by an attachment dissolved in Connecticut by amending a writ in favor of A, B and D as executor of C, sued out after the death of C, on a note payable to A, B and C, by erasing the name of D, and leaving it in favor of A and B as survivors.[5] But in Maine an attachment to enforce a lien for wages is lost by an amendment changing the Christian name of the plaintiff from "Edward" to "Edmund."[6]

The recitals in the writ are amendable under the same general restrictions. In New York where a writ recites as ground for attachment "that the defendant has disposed, or is about to dispose, of property," etc., the use of the disjunctive "or" instead of the conjunction "and" is a mere irregularity; and if the affidavit will support the substitution of the word "and" it may be so amended.[7] A summons issuing from the marine court of New York in an action wherein an attachment and order directing service of publication was granted, erroneously states six days instead of ten as the statute directs, as the time within which the defendant must answer, this being an ir-

1. Sims *v.* Jacobson, 51 Ala. 186.
2. Wight *v.* Hale, 2 Cush. (Mass.) 486.
3. Cain *v.* Rockwell, 132 Mass. 193.
4. Diettrich *v.* Wolffsohn, 136 Mass. 335.
5. Johnson *v.* Huntington, 13 Conn. 47.
6. Flood *v.* Randall, 72 Me. 439.
7. Rothschild *v.* Mooney, 13 N. Y. S. 125, 59 Hun (N. Y.) 622. See as to the use of the disjunctive in stating the ground for attachment in the affidavit, *ante*, § 146.

regularity merely and not an error affecting the jurisdiction, it was amended *nunc pro tunc*.[1] In New Hampshire the precept of the writ, in a case of foreign attachment, commanded the officer to attach the money, goods, etc., of the principal defendant in the hands of two or more trustees, without the use of words to denote a joint possession or liability as trustees; the writ was allowed to be amended by inserting the words "jointly" or "as copartners."[2] In Maine a writ required the officer to attach "certain logs marked Y P X L, Y P X K, and Y P X O now lying," etc. The officer attached "certain spruce logs, * * * sixty-nine in number, being twenty-three of each of the above named marks." The plaintiff asked leave, and the presiding judge allowed him to amend the original writ, by twice inserting the words "and certain logs marked." It was held that the court had discretion so to do.[3] In Iowa, the statute permits amendments which go to the form rather than to the substance, hence a writ may be there amended to correct a clerical error in the amount stated in the writ, and make it conformable to that claimed in the petition and notice.[4] And in Texas the blank in the writ for the amount of the demand being by a clerical error left without filling in the amount and the property being already in the hands of the sheriff under prior attachments, and no third party's rights being affected thereby, an amendment by inserting the amount was permitted.[5]

The *ad damnum* clause was permitted to be increased in a court below in Massachusetts so as to give a right of appeal.[6]

The date of the issuance, or time for the return of the writ, when erroneously stated, being clerical errors, come within the amendments allowable when the rights of third parties do not intervene.[7]

1. Gribbon *v.* Freel, 93 N. Y. 93.

2. Fullerton *v.* Hayes, 32 N. H. 212.

3. Murphy *v.* Adams, 71 Me. 113.

4. Gourley *v.* Carmody, 23 Iowa 212. A dissolution of an attachment after an amendment of such defect was held erroneous. Gourley *v.* Carmody, 23 Iowa 212.

5. Munzenheimer *v.* Manhattan Cloak, etc., Co., 15 S. W. Rep. 389, 79 Tex. 318.

6. Danielson *v.* Andrews, 1 Pick. (Mass.) 156.

7. If the writ shows the date of issuance, a blank date in the clerk's attestation may be filled on motion. Brack *v.* McMahan, 61 Tex. 1.

A writ was dated September 23d,

The attestation is allowed to be amended *nunc pro tunc* in Texas and Colorado.[1] And in Texas the want of a seal is considered a clerical error which may be amended.[2]

The effect of the amendment of a writ is to make such corrections date back to the original process, so far as this can be done without injury to the rights of third parties.[3]

The power of the United States courts to allow amendments is, in the absence of some positive rule of state practice, the same in attachment suits as in others. The supreme courts will not revise a judgment in an attachment suit, for error in allowing the amendments, more rigorously than a judgment in an ordinary action would be revised, unless some local statute has been violated.[4] In fact an amendment has been allowed in a United States court when, under the statutes of the state in which the United States circuit court was held, a state court could not have allowed such an amendment.[5]

§ 198. **To whom issued and delivered — Several writs — Alias writs.**—The writ should always be directed to the proper officer and not to his deputy, and yet if there be no doubt that the writ is meant for the sheriff he may make the levy and his

the attachment was dated September 22d, when it should have been dated the 23d. This was held to be a clerical error, and that it was the duty of the clerk to allow an amendment thereto. McCoy *v.* Boyle, 10 Md. 391.

A clerical error as to the month in the return day is waived by appearance and answer on the day intended. Wellover *v.* Soule, 30 Mich. 481.

An appearance to the suit in a garnishee proceedings and filing an answer is a waiver of any defect in the garnishee summons. National Bank of Commerce *v.* Titsworth, 73 Ill. 591.

A mistake in the writ of attachment sued as an auxiliary to a suit commenced in the ordinary mode may be amended when there is a misstatement of the time when the court, in which the original writ is pending, is to be held. Scott *v.* Macy, 3 Ala. 250.

A writ which is returnable to the second term of court after its date is not void in Colorado, but may be amended. Such writ is sufficient to justify the sheriff in levying goods thereunder. Archibald *v.* Thompson, 2 Col. T. 388.

1. May *v.* Ferrill, 22 Tex. 340; Skinner *v.* Beshoar, 2 Col. T. 383.

2. Cartwright *v.* Chabert, 3 Tex. 261; Whittenberg *v.* Lloyd, 49 Tex. 633.

3. Milliken *v.* Bailey, 61 Me. 316.

4. Tilton *v.* Cofield, 93 U. S. (3 Otto) 163.

5. Ernstein *v.* Rothschild, 22 Fed. Rep. 61.

action will not be void, such misdirection being thereafter curable by amendment.[1] Unless there is a special statute allowing such practice the writ properly issued to a particular officer (as the sheriff of the county) and delivered to another officer (as the sheriff of another county), will be unavailing. Under some statutes, where there is attachable property in several counties, several copies of the writ may be issued at the same time and sent to such different counties for service.[2] In such case it is not necessary to make an indorsement upon such writs, setting forth that they are such duplicates.[3] And under other statutes the sheriff is authorized to serve writs from any other county in that judicial district.[4]

A second writ, or *alias* writ, is in general unauthorized, because the affidavit for the first does not necessarily show the existence of the same state of facts at the subsequent time of issuing the second.[5] In West Virginia and Texas more than one attachment may issue on one affidavit and bond, and if the subsequent one is regular it will cure the defects in the first.[6]

§ 199. **The effect of the writ.**—While the intended effect of the writ is to hold the property until the coming of an execution to enforce the judgment which may be recovered in the

1. Warren *v.* Purtell, 63 Ga. 428.

2. Morris *v.* Trustees, 15 Ill. 266; Carter *v.* Arbuthnot, 62 Mo. 582; Cross *v.* Haldeman, 15 Ark. 200; Reed *v.* Kirkwood, 19 Ark. 332; Pendleton *v.* Smith, 1 W. Va. 16. Compare Stark *v.* Marshall, 3 Ala. 44; Branshaw *v.* Tinsley, 23 S. W. Rep. 184, 4 Tex. Civ. App. 131.

As to presumption when one of the writs is lost, see Gates *v.* Tusten, 14 S. W. Rep. 827, 89 Mo. 813.

3. Saunders *v.* Columbus, etc., Ins. Co., 43 Miss. 583.

4. Sadler *v.* Tatti, 30 Pac. Rep. 1082, 17 Nev. 429.

5. Dennison *v.* Blumenthal, 37 Ill. App. 385.

6. Ballard *v.* Great Western Mining and Mfg. Co., 39 W. Va. 394, 19 S. E. Rep. 510; Branshaw *v.* Tinsley, 23 S. W. Rep. 184, 4 Tex. Civ. App. 131. Compare Barnett *v.* Ring, 55 Miss. 97.

An attachment on a judgment is, however, considered an execution, therefore an *alias* can not issue in such a case until the first is returned. And the failure of the officer to return the first will raise no presumption that it has not been served. Baldwin *v.* Wright, 3 Gill (Md.) 241. But why have an attachment to issue on a judgment? It can not be more effective than an execution. See *ante*, § 23.

attachment suit against the property of the debtor,[1] yet the mere issuance of the writ does not operate to impose such a lien upon the defendant's property.[2] Nor does the lodgment in the hands of the officer.[3] There must first be a levy by an officer having possession of such writ, and no matter how urgent may be the necessity for seizing the property of a debtor who is removing his property for the purpose of defrauding his creditors, no such lien can be created until the writ is issued and in the possession of the officer making the seizure.[4] The only effect, therefore, which the writ can have is to authorize the officer to whom it is directed to make a levy on the defendant's property for the purpose therein set forth. When the writ is issued as an ancillary process to the summons theretofore issued in the case, the issuance of the writ is not the commencement of the suit.[5]

A writ properly issued can not be vitiated by any irregularity of the officer executing it.[6]

The lien created by the writ properly served will be the subject of a subsequent article for the consideration of it here before service necessary to create it is manifestly out of order.

1. Trowbridge *v.* Bullard, 81 Mich. 451. See *ante*, § 191, "Purpose of the Writ."

2. Tomlinson *v.* Stiles, 28 N. J. L. (4 Dutch.) 201; Means *v.* Winslow, 1 Smedes & M. (Miss.) Ch. 449.

3. Crowninshield *v.* Strobel, 2 Brevard (S. C.) 80.

4. Wales *v.* Clark, 43 Conn. 183. See further as to "Levy," *post*, § 200.

5. See "Ancillary Proceedings," *post*, § 215.

Under the Nebraska laws, which provide for the issuance of an attachment, "at or after the commencement of the action," the action is considered commenced as soon as the petition is filed in the proper court, and a summons is issued thereon with a *bona fide* intent that it shall be served. Coffman *v.* Brandhoeffer, 33 Neb. 279, 50 N. W. Rep. 6.

In Mississippi, an attachment for rent in arrear is not the commencement of a suit. Towns *v.* Boarman, 23 Miss. 186.

6. Davidson *v.* Owens, 5 Minn. 69.

CHAPTER X.

EXECUTION OF THE WRIT—LEVYING ON THE PROPERTY AND SUMMONING THE DEFENDANT.

Levying on the Property.

§ 200. The purpose of the levy.
201. What officer to make the levy.
202. Officer's duty to make the levy.
203. Officer may require bond of indemnity, when.
204. Officer protected in his official acts.
205. When the officer should make the levy.
206. The amount of property to be secured by levy.
207. The manner in which the levy should be made—(a) Generally.
§ 208. (b) On property susceptible of manual delivery.
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210. (d) On chattels intermixed with those of a stranger.
211. (e) On property owned jointly or in common with a stranger.
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215. Levy of ancillary attachment —"Attachment in aid."

Summoning the Defendant—Constructive Service—Publication.

§ 216. Necessity of service or constructive service.
217. The purpose of publishing notice.
218. As to the publication itself.
219. Other acts than publication necessary—Mailing, posting and filing notices — Inventory.
§ 220. Publication and other required acts must appear upon the record to have been performed.
221. The extent to which errors in the levy and personal service are waived by appearance.
222. Amendment of the service of the writ.

Levying on the Property.

§ 200. The purpose of the levy.—A perfected attachment is an equitable assignment of the thing attached. It is

the substitution of the creditor for the debtor.[1] This is the object sought to be attained by attachment, and the purpose of the levy is to get the property of the debtor into the possession of the officer, there securely to await the determination of the right of the matter in controversy, in order that such property may be taken by the creditor in satisfaction of his demand, if such be the right; or that it may be returned to the alleged debtor in the event of the creditor failing to prove the justice of his demand. The officer, by making a levy, gets a special property in the goods attached, defeasible by the plaintiff's failing in his action, or not levying the execution within the time prescribed, or by the satisfaction of the judgment before sale of the goods.[2] The general property remains in the debtor.[3] The owner of personal property attached upon a writ against him, which property is actually retained by the officer or his bailee, may transfer his interest therein, either absolutely or in mortgage, subject to the attachment lien.[4] And the attaching creditor gets a *lien* on the property levied upon, which lien secures it to be applied toward the satisfaction of the creditor's demand in the event of the same being established. He is a creditor in possession, but it is the service of the writ by the officer's levy upon the property that secures it. The mere lodgment of the writ in the hands of the officer will never bind the property.[5] No title passes to the property seized until after judgment, execution, and a sale of such property thereunder.[6]

It is for the purpose of acquiring such a lien upon, and control over, the property of the debtor, to insure the satisfaction of the creditor's demand when legally established, that a levy must be made, and the levy can operate only upon the right of

1. Reed *v.* Penrose, 2 Grant (Pa.) Cas. 472.

2. Ladd *v.* North, 2 Mass. 514; Parsons *v.* Phillips, 1 Root (Conn.) 481; Johnson *v.* Edson, 2 Aikens (Vt.) 299.

3. Ludden *v.* Leavitt, 9 Mass. 105; S. P. Dillenback *v.* Jerome, 7 Cow. (N. Y.) 294; Fettyplace *v.* Dutch, 13 Pick. (Mass.) 388.

4. Wheeler *v.* Nichols, 32 Me. 233; Starr *v.* Moore, 3 McLean (U. S.) 354.

5. Bethune *v.* Gibson, 2 Brev. (S. C.) 501; Tomlinson *v.* Stiles, 28 N. J. L. (4 Dutch.) 201.

6. Davidson *v.* Beatty, 3 Har. & M. (Md.) 594; Owings *v.* Norwood, 2 Har. & J. (Md.) 96.

the debtor existing at the time it is made. Any interest subsequently acquired by the debtor can not in any manner be affected by the seizure and return, when none was possessed by him at the time. If the levy of execution would not be effectual to pass any title of the creditor at the time the levy is made on an attachment, the levy on attachment can have no effect toward creating a lien.[1] The effect of the levy will be more fully considered hereinafter in a chapter entitled "The Lien Created by Attachment."[2]

§ 201. **What officer to make the levy.**—In general, the levy is to be made, as a matter of course, by the officer to whom it is directed.[3] This rule, however, has its modifications. Constables may make levies upon writs issued by justices of the peace, and in some states they are authorized to serve writs issuing from the circuit courts on a demand not exceeding a stated amount.[4] And as a general rule the sheriff may serve all writs of attachment within his bailiwick, although the same might have been served by a constable. If a constable makes a levy and turns the property over to the sheriff, it seems the sheriff may thereby become himself responsible for the possession of the property, and not as bailee for the constable.[5] No officer who is interested in the suit in which the

1. Crocker *v.* Pierce, 31 Me. 177.

2. Post, § 313.

3. In Kentucky a writ of attachment must be executed by the officer to whom it is directed. It is unlike a summons in this respect. Menderson *v.* Specker, 79 Ky. 509.

It does not follow that, because two or more counties compose one judicial district, they are connected "for judicial purposes." An attachment, therefore, must be served by the sheriff of the county in which the property is situated. Sadler *v.* Tatti, 17 Nev. 429, 30 Pac. Rep. 1082.

4. Brinsfield *v.* Austin, 39 Ala. 227; Carter *v.* Palmer, (Ala.) 7 So Rep. 531; Drewry *v.* Lienkauff, 94 Ala. 486, 10 So. Rep. 352.

Not in New Jersey. Weingardt *v.* Billings, 51 N. J. L. 354, 20 Atl. 59.

5. Joseph *v.* Henderson, 95 Ala. 213, 10 So. Rep. 843.

Under one statute a constable was not authorized to levy an attachment on any property which was not capable of manual seizure or a manual surrender by the defendant or his bail. Wolbert *v.* Fackler, 32 Pa. St. 452.

It was held in one case that a constable could levy an attachment upon property already in the possession of the sheriff under an execution, but that he had no right to remove it from the custody of the sheriff. Benson *v.*

writ issued can levy an attachment, although the writ be directed to him.[1] And it has been held that a sheriff could not serve a writ against a town in which he had ratable estate and was taxed, although he was not, at the time of making such service, a resident inhabitant of the town.[2] And further, that a deputy sheriff could not serve a process in favor of a town in which he was ratably an inhabitant, although the sheriff under whom he acted was at the time an inhabitant of another town and had no interest in the town in favor of which the process issued.[3] All acts necessary to constitute a levy must be made by the same officer. Some can not be made by one officer and some by another.[4] When a levy is made by the officer authorized by law to execute the writ, such levy will not be void because of any mistake in directing the writ. Such error is amendable.[5]

The sheriff may appoint a deputy for general purposes or for the especial purpose of serving that particular writ.[6] The sheriff and his deputy are considered one person in law.[7] And the powers of a deputy sheriff in serving writs are the same as the sheriff, except that he is not recognized or obeyed as a sheriff or known officer is, but must show his authority and make known his business, if required so to do by the party who is to obey the mandate in his hands.[8] The sheriff can serve an attachment against his deputy, but the deputy can not serve an attachment against the sheriff.[9] When the sheriff or his deputy is a party to the suit, a constable may serve the writ if the damage alleged is within the limit named by the statute for service by constables.[10]

Berry, 55 Barb. (N. Y.) 620. But see as to "property in *custodia legis*," *ante*, § 46.

1. McLeod *v.* Harper, 43 Miss. 42.
2. Evarts *v.* Georgia, 18 Vt. 15.
3. Lyman *v.* Burlington, 22 Vt. 131.
4. Carroll County Bank *v.* Goodal, 41 N. H. 81.
5. Warren *v.* Purtell, 63 Ga. 428.
6. A person under twenty-one years of age may be made a deputy to serve and return a writ of attachment, and property by him attached is as much in custody of the law as if attached by the sheriff himself. Moore *v.* Graves, 3 N. H. 408.
7. Whitney *v.* Butterfield, 13 Cal. 335.
8. Burton *v.* Wilkinson, 18 Vt. 186.
9. Ford *v.* Dyer, 26 Miss. 243; Ingraham *v.* Olcock, 14 N. H. 343.
10. Briggs *v.* Strange, 17 Mass. 405.

Subsequent levies must be made by the same officer who made the former attachment, because he is regarded as having legal possession and control of the property.[1] If the first proves to be insufficient and the proceedings are dismissed, the second levy will be good because the property is in possession of the officer.[2] And although the first levy may be good, yet if the property attached more than satisfy the first attaching creditor, the remainder may, in some states, be held under the levy of the second writ.[3] But no lien upon the proceeds of a sale of goods under attachment by an officer can be created by a subsequent attachment, unless the subsequent attachment be made while the first is subsisting.[4] If several levies are made by the same officer, their priority will depend upon the time the levy is made, or upon the time when the officer began to hold under the subsequent writ. When the property is in his possession under one attachment no overt act is necessary to constitute a levy on a second writ. The second levy takes effect at the time the officer begins to hold under it, and his return on the writ is evidence of the time such levy is made.[5]

When the sheriff is incapacitated from serving a writ, the general rule is that such service must be made by a coroner; and a service in such case by the deputy of the sheriff is unauthorized and defective.[6] Where there is no sheriff or coroner in the county a writ of attachment may be served by an *elisor* appointed by the court.[7] And where the writ has been served by the coroner, and an *elisor* has been appointed by the clerk,

1. Rogers *v.* Fairfield, 36 Vt. 641; Bailey *v.* Childs, 46 Ohio State 557, 24 N. E. Rep. 598.

2. Coffin *v.* Smith, 51 Vt. 140; Wallace *v.* Berry, 51 Vt. 602.

3. See *ante*, § 46, "Property in *custodia legis*."

4. Adams *v.* Lane, 38 Vt. 640.

5. Corning *v.* Dreyfus, 20 Fed. Rep. 426.

6. Ingraham *v.* Olcock, 14 N. H. 243.

But such a defect of service will not furnish ground of abatement to other trustees, included in the same process with the sheriff. Accordingly where process of foreign attachment was instituted against the sheriff and another person, and service of the writ was made by the deputy of the sheriff, and the sheriff pleaded such defect of service in abatement, it was held that the plea would operate to abate the writ as to the sheriff, but not as to the other trustee. Ingraham *v.* Olcock, 14 N. H. 243.

7. McFarland *v.* Tunnel, 51 Mo. 334.

and the *elisor* serves the writ of replevin upon the coroner, it will be presumed that there was no sheriff to serve the writ.[1] When one, other than an officer, is directed to serve a writ, the mandate must be strictly observed; for where the writ was directed to any sheriff or coroner, "or to George Brooks," no authority is conferred upon George Brooks to execute the writ.[2] When an attachment is made by one appointed for that purpose, his return must be accompanied by the evidence of his appointment, because the credit to be given to his return depends upon the validity of the appointment.[3] If an officer empowers a stranger to make a levy and afterwards adopts it by his return, it becomes his own act and he will be held responsible therefor.[4]

The effort of a wrong officer to serve a writ may make him liable as a trespasser and render the levy void. But a writ legally and regularly issued and directed to the proper officer can not be avoided or made void by matters subsequent; or by having a return indorsed on it by an officer or person not authorized by law to serve it. Such indorsement is a mere nullity and imposes no obligation on the defendant to appear nor does it subject him to any legal consequences as for a default. Service by a coroner of a writ directed to a sheriff is no ground for dismissing the suit, although it is a matter which will excuse the defendant from answering.[5]

As already shown,[6] a levy may be made by an officer in one county upon a writ issued from another county when the writ is properly directed and the officer can find property of the defendant within his bailiwick.

§ 202. **Officer's duty to make the levy.**[7]—A levy can not be made until the writ is actually delivered to the officer, and if he should before then undertake to seize property he becomes as much a trespasser as any stranger who interferes with the

1. Beach *v.* Schmultz, 20 Ill. 186.
2. Brooks *v.* Fair, 51 Vt. 396.
3. Currens *v.* Ratcliffe, 9 Iowa 309.
4. Clarke *v.* Gary, 11 Ala. 98.
5. Hughes *v.* Martin, 1 Ark. 386.
6. See *supra*.
7. As to "what property may be reached," see *ante*, § 28.

rights of a citizen.[1] It is by the authority with which the writ clothes him that he is enabled to seize a man's property without becoming liable as a trespasser, and it is a matter of great importance to him to know the limitations of the power vested in him by virtue of the writ in his possession. Such limitation will be considered presently, but first we must speak of his duty to obey the commandments of the writ. When the officer receives a writ of attachment to be executed, and not before, it is his duty to set about the performance of the acts which it commands; but he is not bound to start, upon the instant of his receiving the writ, to execute it without regard for anything else. Reasonable diligence in the service of writs is all that is required of him, and what is reasonable diligence depends upon the particular facts of each case.[2] An officer is only required to exercise such reasonable discretion as would influence the conduct of prudent and discreet men in the management of their own affairs.[3] In making a levy upon chattels it is his duty to proceed to remove them or take them into his custody (in the manner shown herein below), with all convenient speed, otherwise he and his official bondsmen will be liable for his negligence. A delay of seven hours in the removal of furniture from a dwelling, or taking steps toward its removal, is too great.[4] It has been held in one case that where he neglected for four hours to remove a desk, books and other office furniture, and when, because of such delay, the closing time came and he was locked in the office, that he could not maintain an action for false imprisonment. It was his duty to have removed the chattels within a reasonable time.[5]

1. Wales *v.* Clark, 43 Conn. 183.

2. Whitney *v.* Butterfield, 13 Cal. 335.

Where one writ came into a sheriff's hands on Sunday and another into the hands of his deputy, on Monday morning, which was served before the one then in the sheriff's possession, the sheriff was not deemed guilty of negligence when he did not know of the circumstance.

3. Dewitt *v.* Oppenheimer, 51 Tex. 103.

4. Davis *v.* Stone, 120 Mass. 228.

5. Williams *v.* Powell, 101 Mass. 467.

The fact that the defendant becomes bankrupt more than four months after the issuance of the writ does not excuse the sheriff, in whose hands the writ was placed for service, for neglect in serving it. Carlisle *v.* Soul's Estate, 44 Vt. 265.

When a sheriff has received a writ, and it is in his custody and control, it is not necessary that he should have the writ on his person when he makes a levy under it.[1] But a deputy sheriff is not recognized or obeyed as a sheriff or known officer is, but must show his authority and make known his business if required so to do by the party to be affected by it.[2] Therefore he should have the writ with him in order that the same may be exhibited if necessary.

An officer can not refuse to serve a process regularly issued to him because in his opinion it is defective or irregular.[3] Nor because he knows it to have been maliciously sued out. He must serve it, or he will be liable to the plaintiff.[4] A writ, which is irregular and voidable only, protects the officer in all acts which it commands him to do, and which he does before it is judicially declared to be void.[5] It commands him to do certain acts and he must obey. If he fails to do so he is liable to the plaintiff who procured it to be sued out. But if the writ is absolutely void he is not required to serve it.[6] It is therefore incumbent upon the officer, when the writ is first placed in his hands, to see that it is in due form of law, and that it is issued by an officer having legal power to issue writs of attachment.[7]

Where two writs against the same person are placed in the hands of the same officer it is his duty to first make a levy upon the writ which first came into his hands, unless he is otherwise directed.[8] The first levy gives the prior lien.[9] But when several attachments are made on the same day, and there is nothing in the officer's return nor on the face of the proceed-

1. Barney *v.* Rockwell, 60 Vt. 444, 15 Atl. Rep. 163.

2. Burton *v.* Wilkinson, 18 Vt. 186.

3. Roth *v.* Devall, 1 Idaho 149.

4. Rice *v.* Miller, 70 Tex. 613.

5. Ela *v.* Shepard, 32 N. H. 277; McFadden *v.* Whitney, 51 N. J. L. 391.

6. Stevenson *v.* McLean, 5 Humph. (Tenn.) 332; Reams *v.* McNail, 9 Humph. (Tenn.) 542.

7. The extent of his protection will be considered in the next two succeeding sections.

As to what officer is legally authorized to issue writs of attachment, see *ante*, § 194.

8. Bragg *v.* State, 30 Ind. 427.

9. Crowningshiel *v.* Strobel, 2 Brev. Pt. 1 (S. C.) 80. See also "When Officer Should Make the Levy," § 205, below.

ings to show which was the first one served, it will be presumed that they were served at the same time; but if the levies are shown to have been made at a different time of the same day, they will take precedence according to the priority of service.[1] And where there are several levies which have been made at the same time there should be a distribution, *pari passu*.[2] In case there should be several levies by the same officer, the priority is determined by the time of the levy or by his commencement to hold under subsequent processes.[3]

As before shown,[4] property in custody of one officer can not be attached by another officer. And when an officer knows that there is a subsisting valid attachment he can not attach it, although the property is being used by the debtor, if he is using it merely for his temporary convenience, under a contract of bailment of the property with the sheriff making the attachment. But where a sheriff merely knows that property in possession of the debtor has been attached, such knowledge will not prevent him from making a valid attachment.[5] If different officers make successive levies upon the same chattel, the return of each will be *prima facie* evidence of the attachment made by him, but the officer making the second levy may show by other evidence that the officer making the first levy did not have the chattel in his possession or under his control at the time of the second attachment, and this will establish the validity of such second levy, and be a justification of the officer making it.[6]

When the officer receives a writ on Sunday it is not to be considered as officially received by him on that day, but he can retain it and consider that it is officially in his possession when Sunday has expired.[7]

The duty of the officer to make a levy continues so long as

1. Ginsberg *v.* Pohl, 35 Md. 505.
2. Nutter *v.* Connett, 3 B. Mon.(Ky.) 199.
3. Corning *v.* Dreyfus, 20 Fed. Rep. 426.
4. See *ante*, § 46, "Property in *custodia legis*."
5. Young *v.* Walker, 12 N. H. 502; Chadbourne *v.* Sumner, 16 N. H. 129.
6. Bruce *v.* Holden, 21 Pick. (Mass.) 187.
7. Whitney *v.* Butterfield, 13 Cal. 335.

the writ is in his possession, and although the defendant may not have had property subject to levy when the writ was first received by the officer, and although that fact may have been indorsed on the writ, yet, if subsequently thereto and before the return the defendant acquired such property, or if further search by the officer discloses such property, it is the officer's duty to levy upon it.[1]

§ 203. **Officer may require bond of indemnity when.**—When an officer is directed to serve a writ and there is a reasonable doubt that the title to the property is in the defendant, the officer may demand an indemnifying bond from the creditor before he levies upon the property; and if such bond of indemnity is not given, the officer is under no obligation to make a levy upon the property.[2] Where the defendant's property in the goods is disputed, the sheriff has a common law right to require indemnity before seizing the property.[3] When the property which the officer is directed to seize is not in possession of the defendant but is in possession of a third person, and there is reason to doubt that the defendant owns such property, the sheriff may lawfully require a bond of indemnity before he makes the attachment.[4] If the property is attached without any controversy as to the title and is afterwards claimed by a third person, the officer may then demand a bond of indemnity before he proceeds any further.[5] A bond of in-

1. Courtney *v.* Carr, 6 Iowa 238.

As to "When the officer should make the levy," see *post*, § 205.

2. Smith *v.* Cicotte, 11 Mich. 383; Smith *v.* Osgood, 46 N. H. 178.

3. Shriver *v.* Harbaugh, 37 Pa. St. 399.

Such indemnity protects the sheriff and through him the garnishee, where he is made the sheriff's bailee during the pendency of the process. Shriver *v.* Harbaugh, 37 Pa. St. 399.

The officer has no right to demand an indemnifying bond in a greater sum than is necessary to secure him, and should the plaintiff agree to give such a bond it can not be enforced. Wadsworth *v.* Walliker, 51 Iowa 605.

If the statute requires the indemnifying bond to be under seal, such a bond can not be executed by an agent unless his authority so to do is also under seal. St. Louis Dairy Co. *v.* Sauer, 16 Mo. App. 1.

4. Chamberlain *v.* Beller, 18 N. Y. 115.

5. Smith *v.* Osgood, 46 N. H. 178.

While an officer is not bound to make an attachment where the title is in doubt, yet if he has made such an attachment and having thereafter demanded an indemnifying bond, and

demnity, executed after the levy for the purpose of protecting the officer, is valid.[1] But a sheriff can not, before levying an attachment, demand a bond of indemnity on a ground of defects in the bond on which the attachment issued.[2]

Any agreement made with or security executed to a sheriff or other officer to induce him to omit the making of the levy on the writ, or the performance of any other duty, will not protect the officer against the party in whose suit the writ issued. The agreement being without consideration, so far as the officer is concerned, can not be enforced by him. All such contracts are void from considerations of public policy, and whether it is in his hands or is attempted to be enforced for his benefit, it is utterly void.[3] A promise to indemnify the officer for making a lawful levy is good, but a promise to indemnify him for not making a levy can not be enforced.[4]

§ 204. **Officer protected in his official acts.**—The general

has received the same, he can not release the property without making himself liable to the plaintiff, unless the property was in fact exempt from attachment. Wadsworth *v.* Walliker, 50 Iowa. 605.

If exempt property has been attached, the giving of an indemnity bond by the plaintiff does not prevent the officer from returning the property to the defendant. State *v.* Thomas, 7 Mo. App. 205.

1. Dewitt *v.* Oppenheimer, 51 Tex. 103.

2. Shaw *v.* Holmes, 4 Heisk. (Tenn.) 692.

Neither can he make a return *nulla bona* because a third person claims the property and the plaintiff will not indemnify. Shaw *v.* Holmes, 4 Heisk. (Tenn.) 692.

When the sheriff justifies his refusal to make a levy, or his restoration of the property after a levy has been made, upon the ground that the defendant has transferred the property, he assumes the burden of proof that the transfer was *bona fide* and effectual in law for the purpose for which it was made. Smith *v.* Leavitts, 10 Ala. 92.

An officer who has been instructed to make a levy, and having reason to doubt that the goods are the property of the debtor, may not only require that he be indemnified for any mistake he may make in conforming to the creditor's instructions, either in his levy on attachment or in seizing them on execution, but he may also insist that the creditor show the goods to him. For if, without making any such claim or request, he undertakes to execute the precept as well as he can, he will render himself answerable for not attaching the goods, when in his power, in case the creditor proves to have been injured by his neglect. Bond *v.* Ward, 7 Mass. 123.

3. Cole *v.* Parker, 7 Iowa. 167.

4. Denson *v.* Sledge, 2 Dev. (N. C.) 136.

If, however, the indemnity bond

rule is that a process regular on its face, which issued from a court of competent jurisdiction, is a sufficient protection to a ministerial officer acting under it,[1] although it may have been issued without authority.[2] Mere irregularity in the issuance of a writ of attachment does not lessen its protection of the officer serving it, as a general rule. In Wisconsin, however, it is necessary that such officer be without knowledge of such irregularity.[3] The process, though irregularly issued, will justify the officer acting under it at any time before it is vacated.[4] But the protection extends only to the officer who acts under it in the discharge of his public duty. It is no protection to creditors, or parties procuring the writ to be issued, for taking and detaining property under it.[5] As soon as an attachment

contains any proviso or condition precedent, such for instance as that the sheriff would give notice to the plaintiff in order that he might defend if an action was brought by the claimants of the property, the sheriff can not recover on his bond against the plaintiff unless he complies with such condition. Preston *v.* Yates, 24 Hun (N. Y.) 534.

The officer can not maintain an action on his indemnifying bond where he has failed to return the writ under which the attachment was made. Wiggin *v.* Atkins, 136 Mass. 292.

Under a statute providing for the taking of an indemnity bond stating that the sheriff shall not be liable for any damages or injury sustained by the claimant in consequence of such attachment, it was held that where such a bond was taken and the suit thereafter dismissed, the claimant's remedy was by an action on the bond and not by an action of trespass. Paddock-Hawley Iron Co. *v.* Mason, 16 Mo. App. 320. See also St. Louis Dairy Co. *v.* Sauer, 16 Mo. App. 1.

On the contrary, it is held in New York that where a wrongful attachment has been made after the defendant has given an indemnifying bond to the plaintiff, the liability of the plaintiff rests upon the wrongful taking of the property and not upon the bonds, nor is it governed by the conditions of the bonds. Dyett *v.* Hyman, 29 N. E. Rep. 261, 129 N. Y. 351.

1. Levying an attachment is a ministerial act. Matthews *v.* Ansley, 31 Ala. 20.

2. Noble *v.* Holmes, 5 Hill (N. Y.) 194; Brichman *v.* Ross, 67 Cal. 601; Fall Creek, etc., Co. *v.* Smith, 71 Pa. St. 230.

3. Bogart *v.* Phelps, 14 Wis. 88; Grace *v.* Mitchell, 31 Wis. 533.

In such a case he may refuse to proceed without indemnity from the plaintiff. Grace *v.* Mitchell, 31 Wis. 533.

4. Ela *v.* Shepard, 32 N. H. 277; Matthews *v.* Densmore, 109 U. S. 216; McFadden *v.* Whitney, 51 N. J. L. 391.

5. McFadden *v.* Whitney, 51 N. J. L. 391; Wehle *v.* Butler, 35 N. Y. Super. Ct. 1.

is set aside the plaintiff stands as if no process had ever been issued. He becomes a trespasser *ab initio*.[1]

It may be necessary for the officer to justify his levy by proof that he acted under a valid writ, but the proper consideration for this phase of the subject would be in an article on the "Liability of Executive Officer."[2]

§ 205. When the officer should make the levy.—An officer can not make a valid attachment before the writ comes into his possession. The making of a levy according to directions by telegram before receiving the process which is sent by mail renders the attachment void and the officer liable as a trespasser.[3] There is no legal objection to the delivery of a writ of attachment being made to the sheriff on Sunday, but it can only be considered to be officially in his hands when Sunday has expired.[4]

It is almost a universal rule that the service of a writ of attachment on Sunday is void.[5] But in Alabama, on the theory that while a judicial act can not be performed on Sunday, yet a ministerial act may be; and because a levy by a proper officer is a ministerial act, it is held that although it is irregular to issue a writ of attachment on Sunday it may be levied or served on that day.[6] In Missouri, to warrant the making of a levy

1. Lyon *v.* Yates, 52 Barb. (N. Y. Supr.) 237.

But the fact that the property has since been subjected to a valid execution in his favor may be shown in a suit against him for damages. Lyon *v.* Yates, 52 Barb. (N. Y. Supr.) 237.

2. *Post*, § 399

3. Wales *v.* Clark, 43 Conn. 183; Taylor *v.* Evans, (Tex. Civ. App.) 29 S. W. Rep. 172.

4. Whitney *v.* Butterfield, 13 Cal. 335; Johnson *v.* Day, 17 Pick.(Mass.) 106, 109.

5. Van Vechten *v.* Paddock, 12 Johns. (N. Y.) 178; Butler *v.* Kelsey, 15 Johns. (N. Y.) 177; Morris *v.* Shew, 29 Kan. 661; Tracy *v.* Jenks, 15 Pick. (Mass.) 465, 467; Blair *v.* Shew, 24 Kan. 280.

For a historical and metaphysical consideration of the duration of time deemed to be Sunday, see Fox *v.* Abel, 2 Conn. 541; Geer *v.* Putnam, 10 Mass. 312; Pearce *v.* Atwood, 13 Mass. 324, 347; Delamater *v.* Miller, 1 Cow. (N. Y.) 75, note (a); Hoghtaling *v.* Osborn, 15 Johns. (N. Y.) 119; Story *v.* Elliot, 8 Cow. (N. Y.) 27; Morgan *v.* Richards, 1 Browne (Pa.) 171.

6. Matthews *v.* Ansley, 31 Ala. 20. In this case the writ was actually issued on Sunday, but it appeared on its face to have been on a secular day. It was held that the court could not command the clerk to correct the date, and then quash on motion on account of its irregularity. Matthews *v.* Ansley, 31 Ala. 20.

on Sunday, the affidavit must state "that the debtor is about fraudulently to secrete or remove his effects."[1]

Although a levy may not be made on Sunday, yet if it be legally begun on Saturday it may be completed at the first convenient time after, before the time of service expires.[2]

From the fact that a writ properly issued can not be vitiated by any irregularity in the officer in executing it,[3] the proper course to pursue when a levy is irregular, because of having been made on Sunday, is to move the court to set it aside for such irregularity.[4] Or it may be pleaded in abatement. But (at least in Alabama) the fact that a service of process was made on Sunday does not render a judgment by default either void or reversible.[5]

The levy must, of course, be made within the time allowed by the statute for the serving of the writ, for a levy made after the return day will not create a lien.[6] In computing the time in which a writ must be served the return day must always be excluded, and if that day falls on Sunday it is to be regarded as *dies non juridicus*.[7] And when the time of service under

1. Updyke *v.* Wheeler, 37 Mo. App. 680.

In Kansas an officer had two writs, and served one on Sunday by taking the property in his possession for the purpose of holding it until he could make a valid levy. On Monday, while the property was still in his possession under the first, he served the second and also returned the first *nulla bona*, procured an alias and served it. It was held that the writs served on Monday were not absolutely void and that their validity could not be questioned in an action of replevin brought by the owner against the officer. Blair *v.* Shew, 24 Kan. 280.

2. Pearson *v.* French, 9 Vt. 349; Fifield *v.* Wooster, 21 Vt. 215.

3. Davidson *v.* Owens, 5 Minn. 69.

4. Cotton *v.* Huey, 4 Ala. 56.

5. Comer *v.* Jackson, 50 Ala. 384. See as to "Dissolution," *post*, § 326.

6. Nance *v.* Barber, 26 S. W. Rep. 151.

The writ may be served any time before it is returnable, even though the sheriff may have indorsed on the writ the fact that the defendant had no property, that being true at the time the indorsement was made, yet if the defendant subsequently and before the return of the writ acquired property, or if further search discloses property belonging to him, it is the duty of the officer to attach it. Courtney *v.* Carr, 6 Iowa 238.

7. Baxley *v.* Bennett, 33 Ga. 146.

In Indiana writs of attachment do not fall within the rule of personal writs, but may run until executed; or at least until it can be executed by reasonable diligence. Will *v.* Whit-

the statute expires on Sunday, service made upon it the next day is valid.[1] And if a statute requires that a writ must be served a certain number of days before the return day, both the day of service and the day of return must be excluded. The required number of days must be full days.[2] The requirement of a statute that an attachment shall be made within a certain number of days is not affected by the fact that the defendant prevented personal service within that time by remaining in seclusion in a hotel under an assumed name. If the levy is not made within the required time it will be vacated.[3] If a statute forbids the service of a writ more than a stated number of days before the return day named therein, and the writ comes into the hands of the officer more than such number of days before the return day of it, it is his duty, under the statute, to omit making any service thereof until within such number of days before the return day. For if he attach property upon the writ more than such number of days before the return day, he is not justified by the writ, and acquires no title to the property against an officer who subsequently takes the same property legally into his possession.[4]

Although the controlling statute may require the issuance of a summons in the case because the principle that the writ of attachment is in aid of the writ in the main action, yet if the summons has been made out and is in the hands of the person authorized to serve it and with a view to service, it is *issued*, and a writ of attachment may be served before the actual service of the summons.[5]

ney, 15 Ind. 194. See also as to Wisconsin, Chase *v.* Hill, 13 Wis. 222, and North Carolina, Hyatt *v.* Simpson, 13 Iredell (N. C.) L. 72.

1. Gribbon *v.* Freel, 93 N. Y. 93.

2. Snell *v.* Scott, 2 Mich. N. P. 108.

The rule, that when by statute an act is required to be done in any number of days less than a week, Sunday is to be excluded, was applied to the peculiar circumstances of this case. Snell *v.* Scott, 2 Mich. N. P. 108.

Delay in levying an execution excused. See Geiges *v.* Greiner, 68 Mich. 153, 36 N. W. Rep. 48.

3. Ludwig *v.* Blum, 18 N. Y. S. 69, 63 Hun (N. Y.) 631.

4. Nelson *v.* Denison, 17 Vt. 73.

And the fact that the debtor neglected to appear at the time set for trial in the first writ, and object to the irregularity of the service does not alter the case. Nelson *v.* Denison, 17 Vt. 73.

5. Bell *v.* Olmsted, 18 Wis. 69; Corson *v.* Ball, 47 Barb. (N. Y.) 452; Mills

The power to make a levy, however, does not survive the recovery of a judgment in the main case. "The attachment is spent and becomes powerless the instant the judgment is entered." The judgment supersedes the attachment, and a writ of execution and not of attachment must then be served.[1]

A levy on an attachment writ may be made notwithstanding the fact that a sale of the property levied upon may have been negotiated, if such levy precede the legal delivery.[2] But if the officer making the levy is offered by the vendee the amount of the claim in the attachment and is asked to return the goods, he must accept it and restore them, or he will be guilty of a conversion.[3]

A levy can not be made upon property after a receiver has been appointed to take charge of it, even before he has filed his bond. It is in custody of the court.[4]

§ 206. **The amount of property to be secured by levy.**— It is the duty of the officer, when particularly instructed, to seize the specific property designated; but when a general writ is placed in his hands without specific instruction he is bound to attach sufficient property to secure the payment of what may finally be recovered, provided that property belonging to the defendant can be found to such an amount. And while he will be liable as a trespasser[5] if he attach any property not belonging to the defendant, yet personal property found in the possession of the debtor may be presumed to be his, if nothing appears to the contrary. And if the officer omits to attach such property, the burden of the proof will be upon him to

v. Corbett, 8 How. (N.Y.) Pr. 500. See Durkhardt *v.* Sanford, 7 How. (N.Y.) Pr. 329; Central Sav. Bank Co. *v.* Langenbach, 1 Ohio N. P. 124.

1. Schieb *v.* Baldwin, 22 How. (N. Y.) Pr. R. 278; Lynch *v.* Crary, 52 N. Y. 181.

2. Judson *v.* Lewis, 7 La. Ann. 55.

But the officer must take possession of the property. Crisman *v.* Dorsey, 12 Colo. 567, 21 Pac. Rep. 920.

3. Klinck *v.* Kelley, 63 Barb. (N. Y.) 622.

4. Regenstein *v.* Pearlstein, 30 S. C. 192, 8 S. E. Rep. 850.

A levy is void in an action in attachment commenced in one county, after the appointment of a receiver in a suit in another county against the same defendant, although the receiver did not qualify and take possession until after levy. Texas Trunk Ry. Co. *v.* Lewis, 81 Tex. 1, 16 S. W. Rep. 647.

5. See *post*, § 387, "Liability of Executive Officer."

show that in fact it was not the property of the debtor. If there be one external *indicia* of ownership in the debtor, the officer can not be excused from making an attachment, when necessary to the security of the creditor, by anything but eventual proof that the property did not belong to the debtor; or, in case of reasonable ground of suspicion by refusal of the creditor to furnish an indemnity bond.[1]

The amount of the property seized is within the sound discretion of the sheriff, and he is responsible to both the plaintiff and the defendant for the exercise of a sound and reasonable discretion in performing his duty. The plaintiff has no more right to dictate the extent of the levy than the defendant has to limit it.[2] The officer commits a flagrant wrong by depriving the defendant of the use of more property than is reasonably sufficient to secure the plaintiff's demand, and if the officer seize such an unreasonable amount it is said that he commits as flagrant a wrong as if he had seized the property without any process whatsoever. It is a wrongful abuse of the writ to willfully seize, for the benefit of the creditor, more than the writ commands.[3]

The attachment is not void because the officer attached property to a greater amount than the writ commands him to do. The officer will hold such property against a subsequent purchaser,[4] until the levy is released by order of court. It is not even void as to the excessive portion, so as to prevent the title from passing to the purchaser at the sheriff's sale, as against one claiming under the attachment debtor by a sale subsequent to the levy.[5]

When a levy has been excessive, the remedy of the attachment debtor, or his assignee, is by application to the court,

1. Bradford *v.* M'Lellan, 23 Me. 302; see also *ante*, § 203, "Bond of Indemnity."

2. Fitzgerald *v.* Blake, 42 Barb. (N. Y.) 513.

3. Hilliard *v.* Wilson, 65 Tex. 286. The plaintiff need not seize property to the full amount of his demand unless he choose to do so. Dwyer *v.* Testard, 65 Tex. 432.

4. Merrill *v.* Curtis, 18 Me. 272.

5. McConnell *v.* Kaufman, 32 Pac. Rep. 782, 5 Wash. St. 686.

from which the attachment issued, to release the levy insomuch as it is excessive.[1] The court is authorized to reduce the excessive levy, by allowing the attaching creditor to elect on which sufficient property he will retain the levy. When there are several defendants claiming different rights, and no such election has been made, the court may proportion the burden of the debt upon the different defendants. And each defendant may replevy the property claimed by him or become the receiver of it by giving proper bond.[2] However, the fact that the value of an article of property is much greater than the sum for which an attachment is to be made, does not make it necessary that the officer should wait to see whether another article nearer to the amount of the claim in value is free from encumbrance and may be held. If the officer attaches an article of much greater value than the creditor's claim he is not bound to take a receipt and release the property attached; if he does so without the creditor's consent he becomes liable to the creditor at all events for the property, but such receipt would be a legal contract if it were taken. Neither is the officer bound, upon request, to accept the deposit of a sum of money for his security equal to the claim, from a third party, nor to take other property of the debtor as a substitute for that attached, and release it. If directed he must attach personal property, and can not excuse himself by attaching real property, although the debtor owns such property. If he should fail to secure a debt, by delaying to examine the title, he would become responsible to the attaching creditor.[3]

The fact that the property taken is of small value does not necessarily avoid the levy of attachment.[4]

1. McConnell *v.* Kaufman, *supra.*

2. Hughes *v.* Tennison, 3 Tenn. Ch. 641. As to "Bond for Release" see *post*, § 286.

The measure of damages in an action against a receiptor, where some articles are replevied and the remainder are worth more than the valuation in the receipt, will be the valuation named. Spear *v.* Hill, 52 N. H. 323.

3. Moulton *v.* Chadborne, 31 Me. 152.

4. Thornton *v.* Winter, 9 Ala. 613.

If the levy is fictitious and colorable, it may be quashed by the court to which it was returned on motion for that reason. Thornton *v.* Winter, 9 Ala 613. See as to Louisiana, Bodet *v.* Nibourel, 25 La. Ann. 499.

Where an officer makes a return, upon a writ of attachment, that he has attached certain goods, and does not fix their value, the presumption of law is, in the absence of all other testimony, that they were of the value commanded to be attached.[1]

§ 207. **The manner in which the levy should be made—(a) Generally.**—Whenever there is any special statutory provision regarding the manner in which the levy shall be made, it must be strictly observed, for, even though the requirement be small, a departure from it will render the levy void.[2] The matter of making a proper levy is one of importance, because it is the levy and not the return on the writ which gives the court jurisdiction of the property.[3] The service of a copy of the writ upon a person in charge of the goods and informing him of the character of the papers without any further steps being taken does not constitute a levy.[4]

In general, an attachment can only be made either by an actual seizure and detention of the property or by garnishment: that is, service of citation upon the defendant's debtor.[5] And there is no such thing as a partial service of the process. It must be either full and complete to the requirements of the statute, or there is no service at all.[6] The actual seizure of the property is alone the basis of the attachment and the jurisdiction of the court, when there is no garnishment. The sheriff must take the property into his actual custody or control and hold it until it is seized under execution after judgment,

1. Childs *v.* Ham, 23 Me. 74.

2. Marnine *v.* Murphy, 8 Ind. 272; Schneider *v.* Sears, 13 Or. 69.

Under one statute, in order to make a valid levy upon personal property, it was not only necessary that the officer take the property into his possession, but that he should go to the place where the property was situate and there declare in the presence of a citizen of the county, that he attached it. Gibson *v.* Wilson, 5 Ark. 422.

For a historical comparison of the Dakota statutes prescribing the manner in which the levy shall be made, see Campbell *v.* Case, 46 N. W. Rep. 504, 1 Dak. 17.

3. Rowan *v.* Lamb, 4 G. Greene (Iowa) 468.

4. Miles *v.* Brown, 38 N. Y. Super. Ct. 400.

5. Nelson *v.* Simpson, 9 La. Ann. 311.

As to service of garnishee process, see *post*, Vol. II.

6. Buckingham *v.* Osborne, 44 Conn. 133.

unless he is sooner ordered to release it by the court.[1] It is not necessary that the officer should handle the goods attached, but he must be in view of them, with the power of controlling them and of taking them into his possession.[2] It is a general rule that to constitute a valid levy the officer must do such overt act as would, but for the protection of the writ, render him liable as a trespasser.[3] And the only exception to this rule is that when the officer is in actual or constructive possession of goods once attached, no overt act of his is necessary to attach them on other writs. He has only to make a return on such writs that he has attached the goods.[4] But his return must show that he has taken the property into his possession and custody; the statement that he has attached "according to law" is not sufficient.[5] If the officer has bailed the goods for safe keeping to a stranger, who has delivered them to the debtor, the officer has not even constructive possession, and in such case he must make an actual seizure of them to constitute a second attachment.[6] He must not, however, go outside of the authority vested in him by the writ; for a levy effected by committing a trespass is bad,[7] and will be dis-

1. Scott *v.* Davis, 26 La. Ann. 688; Gumbel *v.* Pitkin, 8 Sup. Ct. 379; Adler *v.* Roth, 2 McCrary, (U.S. C.Ct.) 445; Lane *v.* Jackson, 5 Mass. 157; Lyman *v.* Lyman, 11 Mass. 317; Phillips *v.* Bridge, 11 Mass. 242; Knap *v.* Sprague, 9 Mass. 258; Vinton *v.* Bradford, 13 Mass. 116; Bridge *v.* Wyman, 14 Mass. 190; Gale *v.* Ward, 14 Mass. 352; Odiorne *v.* Colley, 2 N. H. 66; Huntington *v.* Blaisdell, 2 N. H. 317; Pomeroy *v.* Kingsley, 1 Tyler (Vt.) 294; Dunklee *v.* Fales, 5 N. H. 527; Bagley *v.* White, 4 Pick. (Mass.) 395; Hollister *v.* Goodale, 8 Conn. 332; Anon., 2 Hayw. (N. C.) 73; Taylor *v.* Evans, (Tex. Civ. App.) 29 S. W. Rep. 172.

2. Nichols *v.* Patten, 18 Me. 231.

And in case of an attempt by another to interfere or take possession, he should take such measure as to prevent it unless resisted. Nichols *v.* Patten, 18 Me. 231.

Merely making an oral agreement with the debtor that the attaching creditor shall take charge of it as receiptor, without any apparent change of possession, will not be good levy as against a subsequent levy of another attachment on the same property. Mahon *v.* Kennedy, (Wis.) 57 N. W. Rep. 1108.

3. Alen *v.* McCalla, 25 Iowa 464.

4. Bullitt *v.* Winston, 1 Munf. (Va.) 269; Turner *v.* Austin, 16 Mass. 181; Whittier *v.* Smith, 11 Mass. 211; Thompson *v.* Marsh, 14 Mass. 269; Patterson *v.* Spaulding, 5 La. Ann. 172.

5. Kilbourne *v.* Frellsen, 22 La. Ann. 207. See as to "Return," *post*, § 223.

6. Knap *v.* Sprague, 9 Mass. 258.

7. Bailey *v.* Wright, 39 Mich. 96; Closson *v.* Morrison, 47 N. H. 482.

charged on motion.[1] Furthermore, the officer also lays himself and his bondsmen liable to an action for damages.[2] Likewise a levy effected by fraud and deceit will be set aside on motion and the officer making it will be liable for the damages.[3] As where a slave was decoyed into the jurisdiction of the court and there attached;[4] or where a debtor residing in another state was induced to bring property into this state (which is exempt in the other state), and the property is here attached;[5] or where the creditor fraudulently obtains possession, in another state, of the property of his debtor residing there, and without the knowledge or consent of such debtor, brings it into this state and immediately causes it to be attached;[6] or where the sheriff in one county seized the property, pretending that he seized it by virtue of a writ of attachment, carried it back to his own county, where he made a formal levy under a writ in his possession.[7] But where the officer watched the defendant until another person enticed him out of the state and then made service of a writ by levying upon him the attachment, the service was held void upon plea in abatement.[8] But it was not a fraud where a person paid a pawnee the amount due upon a watch in Kentucky and took it into Tennessee, where an attachment was brought by a plaintiff subject to the amount of such person's claim, there being no collusion between such person and the plaintiff. There was no wrongful act on the part

1. Pomroy *v.* Parmlee, 9 Iowa 140.

2. See *post*, § 386, "Liability of the Officer."

3. Pomroy *v.* Parmlee, 9 Iowa 140; Metcalf *v.* Clark, 41 Barb. (N. Y.) 45.

4. Timmons *v.* Garrison, 4 Humph. (Tenn.) 148.

5. Deyo *v.* Jennison, 10 Allen (Mass.) 410.

In this case the plaintiff made the fraudulent inducement and the officer knew not of it, and yet both the officer and the plaintiff were held to be trespassers. Deyo *v.* Jennison, 10 Allen (Mass.) 410.

6. Powell *v.* McKee, 4 La. Ann. 108; Paradise *v.* Farmers' Bank, 5 La. Ann. 710.

7. Pomroy *v.* Parmlee, 9 Iowa 140. A somewhat similar case, see Upton *v.* Craig, 57 Ill. 257.

8. Nason *v.* Esten, 2 R. I. 337.

As to false and fraudulent allegations of citizenship to obtain jurisdiction in a federal court, see Gilbert *v.* Hollinger, 14 La. Ann. 441.

And as to the fraudulent inducement to procure the discharge of an order holding property in a sister state, that it might be attached in this state, see Paradise *v.* Farmers', etc., Bank, 5 La. Ann. 710.

of the creditor such as there was in enticing a slave within the jurisdictional limits of the court in the case above referred to.[1] The levy must be actual, for the mere pretense of a levy is void.[2]

The statutes generally authorize the property of the debtor to be attached, no matter in whose hands it may be found.[3] When the officer obtains access and control of personal property of the defendant, the levy is complete.[4] But an officer is not authorized by a precept against one person to levy upon the property of another;[5] although of the same kind as that sought under the writ; and though the defendant has lately sold it.[6] In serving attachments, either foreign or domestic, the officer has no authority to take goods out of the possession of one who claims property in them.[7] He is not justified in taking prop-

1. National Bank *v.* Winston, 5 Baxter (Tenn.) 685. Compare Timmons *v.* Garrison, 4 Humph. (Tenn.) 148.

The bare removal and immediate return to the debtor of attached property is not sufficient to repel presumption of fraud arising from the debtor's possession. Burrows *v.* Stoddard, 3 Conn. 160.

2. Gates *v.* Flint, 39 Miss. 365.

In a suit against a non-resident defendant, commenced by attachment, a pretended levy on property to which the defendant has no claim, will not have the effect of constructive notice, so as to authorize the court to render judgment against such non-resident. Grier *v.* Campbell, 21 Ala. 327.

3. Unless in *custodia legis* or under bailment. See *ante*, §§ 41 and 46.

4. Walton *v.* Deignan, 2 Nott. & M. 248; Morse *v.* Hurd, 17 N. H. 246; but see Lewis *v.* Birdsey, 26 Pac. Rep. 623, 19 Or. 164.

When personal property is not in the actual possession of any one, it is in constructive possession of the general owner. Taintor *v.* Williams, 7 Conn. 271.

5. Tufts *v.* McClintock, 28 Me. 424.

6. Wilson *v.* Paulsen, 57 Ga. 596.

If a commodity is priced and bargained for in such quantity as will make a cargo for a certain vessel brought by the purchaser to carry it away, and it is to be paid for by the bushel, the parties may, if interfered with, stop, by mutual consent, with less than a cargo on board; and in that case the delivery will be complete as to so much as is actually on board under the exclusive control of the purchaser. Wilson *v.* Paulsen, 57 Ga. 596. See, as to "Liability of the Officer," *post*, § 387.

7. Moore *v.* Byne, 1 Rich. L. (S. C.) 94.

Service of the writ upon one who has the custody of the assets of the absent debtor, is sufficient to create the attachment lien, without actual seizure of such assets by the officer. Renneker *v.* Davis, 10 Rich. (S. C.) Eq. 289.

Goods stored in a warehouse may be levied upon without making the warehouse keeper a party to the attachment suit. Trounstein *v.* Rosenham, 22 La. Ann. 525.

erty out of the possession of a garnishee who claims either in his own right or in the right of another.[1]

A levy which is not sufficient in itself may have been made so, by some conduct of the defendant operating by way of estoppel or agreement, and yet not be good as to third persons.[2] To make a valid and effective levy as against subsequent attaching creditors, the general rule of law, founded upon the principles of evidence and policy, requires a change of possession and an actual removal of the property attached; but where the removal would be attended with great waste and expense, it may be dispensed with. The officer must, in such case, exercise due vigilance to prevent it from going out of his control, although it is not necessary that there should be a continual presence of himself or his agent with the property.[3] But where personal property is capable of manual delivery, and the officer does not take it into possession, he acquires no special property therein,[4] and the levy will be set aside.[5] The officer must assume dominion over the property. He must not only have a view of it, but he must assert his title to it by such acts, as but for the process would make him liable as a trespasser.[6] To

1. Berry *v.* State, Dudley (S. C.) 215; Moore *v.* Holt, 10 Gratt. (Va.) 284. See also as to "Garnishment Proceedings," *post*, Vol. II.

Under a statute authorizing the attachment "of any estate" of the defendant and providing for service of notice thereof on such persons as may be in possession, it was held that personal property not in the possession of any third persons upon whom service of the writ could be made and which belonged to a non-resident defendant, who was absent from the state at the time of the levy, might be levied on in attachment by the same acts as are essential to a valid common law levy of an execution. Dorrier *v.* Masters, 83 Va. 459, 2 S. E. Rep. 927.

2. Taffts *v.* Manlove, 14 Cal. 47.

3. Mills *v.* Camp, 14 Conn. 219; Bicknell *v.* Trickey, 34 Me. 273.

4. State *v.* Cornelius, 5 Ore. 46.

5. Curwensville Mfg. Co. *v.* Bloom. (Pa. Com. Pl.) 10 Pa. Co. Ct. Rep. 295; but see Dreisback *v.* Mechanics' Bank, 113 Pa. St. 554.

The officer attaching the goods may lawfully remove them from the society or neighborhood where attached, to any proper place within his jurisdiction, for safe keeping, and so may an indifferent person deputized to make the levy use his own judgment as to the place where he shall keep the property attached, and his authority is not limited to any particular precinct. Carter *v.* Clark, 28 Conn. 512. See *post*, §208, "Property Susceptible of Manual Delivery."

6. Abrams *v.* Johnson, 65 Ala. 465;

constitute a valid operative levy, the officer should do such act as to amount to a change of possession, or be equivalent to a claim of dominion coupled with a power to exercise it.[1] He must obtain actual control with power to remove it.[2] The possession acquired and maintained, and the custody and control exercised, must be such as will give timely and unequivocal notice thereof.[3] And if this be done it will be sufficient, without a manual taking of the property.[4] The custody of the officer must be such as to exclude that of the owner.[5] The

Cobb *v.* Gage, 7 Ala. 619; Connell *v.* Scott, 5 Baxter (Tenn.) 595; Cawthorne *v.* McCraw, 9 Ala. 519; Haggerty *v.* Wilber, 16 Johns. (N. Y.) 287; Culver *v.* Rumsey, 6 Ill. App. 598, 7 Ill. App. 422.

Merely seizing a few articles outside of a store or warehouse, and proclaiming a levy or the goods, locked up in the store or warehouse and not within view of the officer, is not a levy. The sheriff ought to break open the store and actually seize the goods and take an inventory of them. Culver *v.* Rumsey, 6 Ill. App. 598, 7 Ill. App. 422. An inventory is not required in all cases. See *post*, § 231.

A grain car, miles away, can not be attached by indorsement only. Such an attempt at a levy would be a nullity and would not be aided by the fact that two days later the officer put a custodian in possession of the car. Culver *v.* Rumsey, 6 Ill. App. 598, 7 Ill. App. 422.

In an attachment of personal property of a railroad corporation there must be actual seizure of the goods intended to be attached. The service of a writ upon a railroad corporation in one county does not bind the defendant's property situate in another county. Pennsylvania, etc., R. R. Co. *v.* Pennock, 51 Pa. St. 244.

1. Crawford *v.* Newell, 23 Iowa 453.

2. Rix *v.* Silknitter, 57 Iowa 262; Powell *v.* McKechnie, 3 Dak. 319; Stockton *v.* Downey, 6 La. Ann. 581; Smith *v.* Orser, 43 Barb. (N. Y.) 187, s. c. 42 N. Y. 132; United States *v.* Graff, 67 Barb. (N. Y.) 304; Corniff *v.* Cook, (Ga.) 22 S. E. Rep. 47.

A levy of attachment on certain patterns in a foundry, confined under lock with the key in possession of the defendant, was held invalid, as the officer had no actual control of the property. Rix *v.* Silknitter, 57 Iowa 262.

Going to a carriage-house containing a barouche, getting a key and unlocking the door, declaring at the time that he attaches the property within, is not an effectual levy upon the barouche as against another officer having another writ who springs in and seized the vehicle. Hollister *v.* Goodall, 8 Conn. 332.

3. Sams *v.* Armstrong, 8 Mo. App. 573.

This was not done in the case of a portable engine by simply telling the owners that it was attached, leaving it in their hands with full permission to work it as before, and asking a man who lived in the neighborhood to keep an eye open to see that it was not removed. Sams *v.* Armstrong, 8 Mo. App. 573.

4. Lyon *v.* Rood, 12 Vt. 233.

5. Russell *v.* Major, 29 Mo. App. 167.

Simply barricading the door to secure a stock of goods in a store-room,

property must not be left in the possession of the debtor unless he gives a forthcoming bond.[1]

Giving notice to a third person who is in charge of starch stored in a barn, that it has been attached, is not such a taking of possession as will prevent the subsequent attachment of the same by other creditors.[2] And the fact that money is the subject of the levy does not alter the rule. It is the duty of the officer to take the money, or if that be impracticable to demand the bond conditioned for its protection.[3]

It may be cited as an exception to the rule that where the property was occupied at the time by military forces, that actual possession by the sheriff was held to be unnecessary.[4] And again that an insufficient levy may be good as against a mere trespasser: as, by going to the place where the property was kept and without taking possession of the property, certifying in his return that he had attached it; this vested the sheriff with the specific property in such case.[5]

Furthermore, it is not only essential in order to *create* the lien that the property must be taken into actual possession of the officer, but it is essential in order to *preserve* the lien thus created that such possession should be vigilantly kept, for when it is relinquished there is a termination of the lien and the general owner is remitted to his property unencumbered.[6] To pre-

which is found locked, and going away leaving the back door unlocked when the owner of the goods has a key to it, is no levy. Bickler *v.* Kendall, 66 Iowa 703.

And if the officer leaves the property in the possession of the defendant's servant, who is in charge of it at the time of the levy, the property will be thereby left in the possession of the defendant and the levy be void. Russell *v.* Major, 29 Mo. App. 167.

1. Root *v.* Columbus, H. V. & T. R. Co., 45 Ohio St. 222, 12 N. E. Rep. 812. See *post*, § 286, "Forthcoming Bond."

If such levy is not made, the property may be seized by any other creditor. Root *v.* Columbus, etc., 45 Ohio St. 222, 12 N. E. Rep. 812.

2. Blake *v.* Hatch, 25 Vt. 555.

Locking up goods in a building and taking the key into possession is not sufficient to exclude subsequent attaching creditors. Newton *v.* Adams, 4 Vt. 437.

3. McNamara *v.* Roderick, (Pa. Com. Pl.) 11 Pa. Co. Ct. Rep. 37.

4. Budd *v.* Stinson, 20 La. Ann. 573.

5. Miller *v.* Fay, 40 Wis. 633.

6. Taintor *v.* Williams, 7 Conn. 271; Walcott *v.* Keith, 22 N. H. (2 Foster) 196. See further as to "Abandonment," *post*, § 256.

Going to a warehouse where the

serve the lien, the officer, either by himself or his agent, must retain control and power to take immediate possession, in all those cases in which the property is capable of being taken into actual possession (unless the statute make exceptions), and if he does not do so his levy will be considered as abandoned, and the attachment dissolved *ipso facto*.[1] However, when a proper levy has been made, the leaving of work animals in the possession of the owner, with the understanding that the attachment still subsists, is not a dissolution of the attachment as against the debtor, or any one having notice of

goods of defendant are, and appraising the same but not taking them into his possession is no valid levy by an officer having a writ of attachment under a statute which requires the officer to "take them into his custody and hold them subject to the order of the justice," nor does the officer acquire such an interest in the goods as will entitle him to replevy them if they are not taken away. Lyeth *v.* Griffis, 44 Kan. 159, 24 Pac. Rep. 59.

1. Nichols *v.* Patten, 18 Me. 231; Waterhouse *v.* Smith, 22 Me. 337; Duncklee *v.* Fales, 5 N. H. 527.

If property is left on the defendant's premises in charge of a keeper, and the keeper departs, leaving it uncared for, this is an abandonment of the levy. Boynton *v.* Warren, 99 Mass. 172; Russell *v.* Major, 29 Mo. App. 167.

But if an officer enters a building where property is stored, makes a public declaration that all the property therein is attached, locks up the building, gives the key to a clerk of the owner, directing him to keep the property for the officer, which he consents to do, it will be a valid attachment of the property in such building. Shephard *v.* Butterfield, 4 Cush. (Mass.) 425.

And if property in a building is attached and the officer, afterwards, without intending to abandon the attachment, takes all the care and custody of the articles, which, from their bulky nature and small value, could reasonably be required, and the debtor then obtains access to the building and mortgages the property to a creditor, who, before recording his mortgage, gets knowledge of the attachment, it will be no abandonment of the attachment, of which the mortgage can take advantage. Shephard *v.* Butterfield, 4 Cush. (Mass.) 425.

But attaching bulky articles in an open shed and leaving them there without any further actual charge of the same or notice of the attachment being posted up is not an attachment in the first instance and not valid, even as against a party having notice. Shephard *v.* Butterfield, 4 Cush. (Mass.) 425.

Although hewn stones have been attached by going among and upon them, and directing the creditor, who receipts for them, and whose place of business was fifty rods from the stones, to take charge of them, the stones not being removed, the possession was retained sufficiently to continue it in force. Hemmenway *v.* Wheeler, 14 Pick. (Mass.) 408.

the facts.[1] Neither will the temporary exclusion of the keeper by fraud or violence raise the presumption that a levy is abandoned.[2] Nor will the issuance and levy by the same plaintiff of a second writ of attachment on the same land on which the first writ has been levied; where the second levy was made, not with the intention of abandoning the first, but merely as a precautionary measure, because the defendant has "come into more open and notorious assertion of rights and ownership" of land.[3] An officer who makes a levy on personal property has no right to let the property go out of his hands except in due course of law. If he does do so, and the debt is thereby lost, he is responsible to the plaintiff in the amount of the debt.[4]

What acts an officer may do in making a levy, under the authority of his writ, without committing a trespass, may in general be indicated by the following examples:

The official clothed with the authority of his writ may break open a store or warehouse or other building, not connected with the dwelling-house or forming any part of the *curtilege*, after first asking admission, if any person is present to grant it, and being refused;[5] nor is he obliged to seek elsewhere for chattels to attach before breaking into such building.[6] Nor will the attachment be invalidated because the levy was made in the night time by forcing an outer door or window of such building forming no part of the *curtilege*.[7] And this he may

1. Howard *v.* Cooper, 45 N. H. 339.

2. Harriman *v.* Gray, 108 Mass. 229.

If the officer is induced, by a trick, to part with possession, and one who purchases thereafter has sufficient notice thereof to induce a prudent man to make inquiries concerning the same, he will get no title as against the sheriff under the writ. Windmiller *v.* Chapman, 139 Ill. 163, 28 N. E. Rep. 979.

But where an officer went into a store to attach goods and made his business known, and while in the act of seizing a bale of cloth, and, before actual touch, was forcibly thrust out, it was held to be not such an incipient act as to give him a right to return and take goods that had been transferred to a third person in the meantime. Williams *v.* Cheesebrough, 4 Conn. 356.

3. Wright *v.* Westheimer, 2 Idaho 962, 28 Pac. Rep. 430.

4. Sanford *v.* Boring, 12 Cal. 539.

5. Platt *v.* Brown, 16 Pick (Mass.) 553; Haggerty *v.* Wilber, 16 Johns (N. Y.) 287.

6. Clark *v.* Wilson, 14 R. I. 11.

7. Solinsky *v.* Lincoln Sav. Bank, 85 Tenn. 368, 4 S. W. Rep. 836.

do, although such building is the warehouse of a third person in which the defendant's goods are stored.[1] And he may remain therein long enough to seize, secure and make an inventory of the defendant's goods,[2] but he can not take exclusive possession of the store of such third person and eject him therefrom with a view to the security or custody of such goods therein; and yet, if the owner resist him or oppose him he may use whatever force is necessary to enable him to perform his duty.[3] The officer is not permitted to break open the outer door of a dwelling-house, but having obtained peaceable admission thereto he may break open the doors of inner rooms if he has asked admission and been refused.

And when several tenants occupy the same passage-way in common, the officer has no right to break in a door leading from such passage-way to the apartments of one of the tenants to get to the property of another against whom he has a writ.[4] The officer may lawfully be resisted in carrying away property from a dwelling-house, the outer door of which, being shut, was opened for the purpose of entering to make the levy.[5] It has been said that if the officer takes exclusive possession of the defendant's building, for the purpose of keeping attached goods therein, it may perhaps be a trespass, but it does not avoid the attachment of the goods.[6] But an officer who levies

1. Burton *v.* Wilkinson, 18 Vt. 186.

Admission must necessarily be asked of the proper person, but if asked by the person having the key, it is sufficient, without asking how he came to be in possession of the key. Burton *v.* Wilkinson, 18 Vt. 186.

2. Messner *v.* Lewis, 20 Tex. 221, and next two cases cited.

3. Fullerton *v.* Mack, 2 Aikens (Vt.) 415; Perry *v.* Carr, 42 Vt. 50.

As to the requisites and sufficiencies of the pleadings in an action for such exclusion depending on peculiar circumstances, see last case.

4. Swain *v.* Mizner, 8 Gray. (Mass.) 182.

5. People *v.* Hubbard, 24 Wend. (N. Y.) 369.

The rule laid down in the old books, by Lord Mansfield and others, that the levy made under such circumstances will be protected while the officer will be held liable for the trespass in entering, is denied in this case. People *v.* Hubbard, 24 Wend. (N. Y.) 369.

6. Newton *v.* Adams, 4 Vt. 437.

An officer having a writ of *execution* against a debtor may lawfully enter his *close*, and seize and sell as personal estate, corn or other product of the soil there growing when ripe and in a fit state to be gathered. Penhallow *v.*

on machinery, which the defendant is at the time using on premises leased by him, has no right to lock up the premises so as to exclude the defendant therefrom, even though the lease is also attached.[1]

If the officer needs assistance in making a seizure, he may call any persons to assist him in making the levy, inventory and appraisement, and it will not be erroneous if he call different persons to assist him as to different pieces of property taken on the same writ.[2]

There is no proper levy when the officer does not know the subject-matter thereof, or actually take it into his possession—as where the officer stands at the door of a store which is locked, keeps others from entering, and declares he has levied an attachment upon the goods therein. The levy would date from the time he got into the store and took possession of the goods.[3] Or, where property is in possession of a bailee, and the officer, after attaching other property, merely writes the bailee that he has attached that which is in his possession, and requests him to keep it, and the bailee agrees to do so, there is no attachment.[4]

An appraisement is a necessary part of a levy under some statutes. When the statute prescribed that in making a levy of attachment the officer must appraise the property levied upon, such appraisement must be made in the manner provided, or the attachment will be void.[5]

Dwight, 7 Mass. 34; but as to the attachment of growing crops see *ante*, § 32.

1. Grey *v.* Sheridan Electric Light Co., 19 Abb. (N. Y.) N. C. 152.

As to the attachment of chattels not susceptible of manual delivery, see *post*, § 209.

2. Will *v.* Whitney, 15 Ind. 194.

As to the administration of an oath to such assistance, see the controlling statute. The proceedings being statutory they need only conform thereto. Will. *v.* Whitney, 15 Ind. 194.

3. Taffts *v.* Manlove, 14 Cal. 47; Hibbard *v.* Zenor, 75 Iowa 471, 39 N. W. Rep. 714; Culver *v.* Rumsey, 6 Ill. App. 598, 7 Ill. App. 422.

4. Barney *v.* Rockwell, 60 Vt. 444, 15 Atl. Rep. 163.

5. Tomlinson *v.* Stiles, 28 N. J. L. (4 Dutch.) 201; Moore *v.* Cutler, 19 Kan. 187; Grebe *v.* Jones, 15 Neb. 312; Cogswell *v.* Mason, 9 N. H. 48.

Where it did not appear by whom one of the appraises was chosen, an attachment on land was held void. Cogswell *v.* Mason, 9 N. H. 48. See "Return," *post*, § 223.

When nothing is omitted but the

A levy that has been begun may be continued, where there are many articles and it requires much time to complete it. The continuance must, however, be necessary. If it be continued until the officer may secure other goods, the taking will be considered as but one act.[1]

A second levy may be made by the same officer on the same writ, if necessary; provided that the first levy was not made for the purpose of making the second; or that the second was not effected by means of the first.[2] But while one valid levy is subsisting a second levy can not be made, except by the officer who made the first levy.[3]

Chattels taken from a prisoner can seldom be attached. The Iowa rule is that where watches, money, or other property is taken from the possession of a prisoner by an officer or jailor, his possession is the possession of the prisoner, and although they are not in any way connected with the crime charged, yet they are not liable to attachment in his hands in an action against the prisoner.[4] While in Alabama it is the duty of the officer to immediately turn the property which he has obtained from the prisoner, over to the court, "to abide the result of the suit," and it can not be attached.[5] And in New Hampshire it is said that if the money or property was so taken from the prisoner solely to secure its safe keeping, and while thus holding it a new process comes into the officer's hands by which he is commanded to attach the property of the prisoner, the property, being rightfully taken from the person of the prisoner, may be attached.[6]

signature of the appraisers, it may be amended in that regard. Hopkins *v.* Langton, 30 Wis. 379.

1. Bishop *v.* Warner, 19 Conn. 460.

2. Gile *v.* Devens, 11 Cush. (Mass.) 59. See, also, Blair *v.* Shew, 24 Kan. 280.

3. Pierce *v.* Jackson, 65 N. H. 121, 18 Atl. Rep. 319. As to "Successive Levies," see *post*, § 408.

As to the proper mode of executing an attachment issued under a military order, see McLemore *v.* Cole, 43 Ala. 620.

4. Commercial Exchange Bank *v.* McLeod, 65 Iowa 665. See *contra*, Pomroy *v.* Parmlee, 9 Iowa 140. As to Oregon, see Dahms *v.* Sears, 11 Pac. Rep. 891, 13 Ore. 47.

5. Warren *v.* Matthews, 96 Ala. 183, 11 So. Rep. 285.

6. Closson *v.* Morrison, 47 N. H. 482.

As to impossibility of attachment when obtained through fraud or trickery, see Pomroy *v.* Parmlee, 9 Iowa 140.

§ 208. (b) **On property susceptible of manual delivery.**—All property susceptible of manual delivery must, as above shown, be taken into the actual possession of the officer making the levy. And when such property can not be conveniently secured in the place where it is found, so that he may retain possession of it there, the officer must remove it notwithstanding the inconvenience of so doing.[1] He may remove it for safety, to any place within his bailiwick, and any indifferent person who has been deputized to make the levy may use his own judgment as to the place where he shall keep the property attached, and his authority is not limited to any particular precinct.[2] This rule extends to movable fixtures. Fixtures which a tenant of the realty may remove may be attached as personalty.[3] Such articles as hay and grain may be taken and removed by the sheriff, when the removal is necessary for its security; but if the sheriff, without any necessity, remove such property, it will render him liable as a trespasser *ab initio*.[4] It would seem such articles as hoop-poles should invariably be subject to the same rule, but in one case where hoop-poles were piled up in separate parcels, with no one to guard them, the sheriff approached only to a place within three or four hundred yards, from which place he could see and could have taken the property into his possession; no one being on guard or in sight, he gave no notice to any one of the levy, made no public proclamation thereof, and did not take the hoop-poles into actual custody, because no bond had been given; he made return on the writ; considering the character of the property, it was held to be a valid levy, as against a subsequent levy in which the same property was taken into actual custody.[5]

Animals attached should be taken into the possession of the officer.[6]

1. Chadbourne *v.* Sumner, 16 N. H. 129.
2. Carter *v.* Clark, 28 Conn. 512.
3. Morey *v.* Hoyt, 62 Conn. 542, 26 Atl. Rep. 127.
4. Barrett *v.* White, 3 N. H. 210.
5. Dorrier *v.* Masters, 83 Va. 459, 2 S. E. Rep. 927. As to "Liability of Officer," see *post*, § 384.
6. Cogswell *v.* Wilson, 21 Pac. Rep. 388, 17 Ore. 31.

A sheriff made return upon a writ

A levy upon an iron safe and its contents is said to be a levy on the contents, although the sheriff, for a considerable time thereafter, be unable to open the safe and take out the contents.[1]

When the articles sought to be attached are in boxes at a depot for transportation, the officer is not authorized to remove the boxes from the depot unnecessarily for the purpose of attachment, and if he does so and shows no necessity therefor he is guilty of trespass.[2]

Property in the hands of a bank or third person is sometimes the subject of direct attachment,[3] but attachment by garnishment is generally the most available in the case of banks.[4] Articles in a safety deposit vault may be the subject of a direct

against one member of a firm, that he had executed it by attaching all the right, title, and interest which the defendant had in the property of the firm; further that he took into his possession certain described personal property belonging to such copartnership, consisting of sheep, and other animals; further that he served a copy of the writ on the defendant, upon which he indorsed a notice that he had so attached the copartnership property, and sent another copy of the writ, with a like indorsement, to the other member of the firm. The levy was good as to the sheep and other animals which the sheriff seized and took into his possession; but did not bind any other of the firm property so as to authorize a sale of it, on execution issued on a judgment directing that the property theretofore attached in the action be sold, as by law provided, to satisfy the plaintiff's demands. Cogswell *v.* Wilson, 21 Pac. Rep. 388, 17 Ore. 31.

1. Elliot *v.* Bowman, 17 Mo. App. 693.

2. Peeler *v.* Stebbins, 26 Vt. 644.

It is said in this case that he has a right to take possession of the boxes and to open them and attach any property liable therein. Peeler *v.* Stebbins, 26 Vt. 644. As to the attachment of property in the hands of a common carrier, see *ante*, § 40.

Under the Montana statute, providing that attachment of personal property capable of manual delivery shall be by taking it into custody, a writ of attachment was sued out by a creditor of the consignee, on two barrels of whisky, and a levy made thereon without removal from the hands of the carrier. It was held to be ineffectual as against a subsequent notice of stoppage *in transitu*, served by the consignor on the carrier, on learning of the consignee's insolvency, the whisky having been left in the carrier's possession, and no claim being made that it could not have been taken "into custody." Kissel *v.* Union Pac. R. Co., 6 Utah 128, 21 Pac Rep. 499. As to the attachment of intoxicated liquors, see Kiff *v.* Old Colony, etc., R. R. Co., 117 Mass. 591, and *ante*, § 28.

3. Clark *v.* Goodridge, 41 N. Y. 210, overruling Drake *v.* Goodridge, 54 Barb. (N. Y.) 78.

4. See *post*, Vol. II.

levy when the officer has specific directions by order of court to make it. A safety deposit vault is only a place for the safe keeping of property, and the sheriff may enter and make the seizure of a box therein when required by law. If it were not so there would be nothing to hinder an insolvent debtor from turning all his property into valuable securities or other articles requiring little space and then placing them in a box of a safety deposit company for preservation and defy all efforts of creditors to satisfy their debts by resorting to processes of law.[1]

A bond, a promissory note, or any other instrument for the payment of money, may be attached by taking the same into the actual custody of the officer.[2] Or the same result may be obtained by summoning the maker as garnishee.[3]

Private correspondence belonging to the defendant can not be seized by the sheriff and he has no authority to examine such books and papers as he may lawfully seize. He may simply keep them safely, subject to the direction of the judge who allowed the process.[4]

Books of account are susceptible of direct seizure for some purposes. It has been said that a levy on a debtor's books of account is an inchoate levy on the debts therein scheduled, and good against the debtor's subsequently appointed general assignee;[5] yet in Massachusetts it is held that account books and private papers are not liable to attachment, because they can not be sold on execution.[6] And in other states a levy of at-

1. United States *v.* Graff, 67 Barb. (N. Y.) 304. See also Barlow *v.* Hall, 2 Anstr. 461; Loveridge *v.* Plaistow, 2 H. Bl. 29; Birch *v.* Prodger, 4 Bos. & Pul. 135; Lyford *v.* Tyrrel, 1 Anstr. 85; Wells *v.* Gurney, 8 Barn. & Cress. 769; *Ex parte* Wilson, 1 Atk. 152.

2. Anthony *v.* Wood, 96 N. Y. 180, s. c. 67 How. (N. Y.) Pr. 424; Pelham *v.* Rose, 9 Wall. (U. S.) 103; Caldwell *v.* Sibley, 3 Minn. 406.

3. See "Garnishment," *post*, Vol. II.

4. Hergman *v.* Dettlebach, 11 How. (N. Y.) Pr. 46.

5. Elliot *v.* Bowman, 17 Mo. App. 693.

6. Oystead *v.* Shed, 12 Mass. 510.

In South Carolina it seems that books of account may be seized under a foreign attachment. Reilly *v.* Middleton, Dudley, (S. C.) 21. But not under a domestic attachment. Reilly *v.* Middleton, Dudley, (S. C.) 21; Ohors *v.* Hill, 3 McCord, (S. C.) 338.

tachment on books of account is not a levy on the debts represented by the books, and does not prevent the person to whom such debts are due from collecting them.[1] But in any case a process of garnishment will reach such indebtedness.

Shares of stock in a corporation may be attached like goods and chattels in some states, but in Illinois an attested copy of the writ must be left with the proper officer of such corporation.[2] While in Alabama an oral notice to the custodian of the books of the corporation seems to be sufficient when the prescribed indorsement is made on the writ.[3]

Policies of insurance may be the subject of attachment at suit of a creditor of one of the heirs of the insured. In making a levy thereon the officer should take the policies into his actual custody. Serving a copy of the warrant and notice upon the insurance company is not a sufficient levy.[4]

A merchant's sign—a wooden boot, in this case—is susceptible of attachment like other chattels.[5]

An article to be levied upon must be *in esse*, and must be capable of being described and identified.[6] It must also be capable of being taken into actual possession. A charcoal pit on fire and partly burned is incapable of attachment. It is no more coal than wood, and it is said that "property in process of manufacture and transition so as to be rendered useless, or nearly so, by having the process arrested, when it will require art and skill and care to finish it, and when completed it will be a different thing, is incapable of attachment."[7]

1. Lesher *v.* Getman, 30 Minn. 321; Goodbar *v.* Lindsley, 11 S. W. Rep. 577, 51 Ark. 380.

And if books of account are attached, any effect which the attachment may have had to prevent collection of the debts will not be an element of damage in an action for wrongful attachment. Goodbar *v.* Lindsley, 11 S. W. Rep. 577, 51 Ark. 380.

2. Union Nat. Bank *v.* Byram, 131 Ill. 92, 22 N. E. Rep. 842.

3. Abels *v.* Real Estate Co., 92 Ala. 382, 9 So. Rep. 423; Abels *v.* Ins. Co., 92 Ala. 382, 9 So. Rep. 423. As to shares of stock in foreign corporations, see *post*, next section.

4. Hankinson *v.* Page, 31 Fed. Rep. 184. See as to certificates of members in benevolent association, next section.

5. Wallace *v.* Barker, 8 Vt. 440.

6. See *ante*, § 28.

7. Wilds *v.* Blanchard, 7 Vt. 138.

§ 209. (c) **On property not susceptible of manual delivery.** —An attachment of personal property can not be made by an indorsement on the writ, and that only. Although the property be of such kind that it can not be immediately removed, yet must the officer be present and take it into his possession.[1] It may be a sufficient taking, as between the debtor and creditor, by an officer charged with the executing of a writ of attachment, if he informs the owner of goods that he has attached them and forbids their removal;[2] but as hereinbefore shown, some sufficient act must be done, in acquiring dominion over property sought to be levied upon, to give notice to third parties of the change of possession. If the articles are so ponderous as not to be susceptible of removal conveniently, many statutes require that the officer or his agent must not only continue to exert control over it, but that some notice must be posted or filed or recorded, or that a copy of the writ of attachment must be left or filed with a specified officer, such act being considered by the statute sufficient to give constructive notice to third persons of the levy made thereon.[3]

1. Darling *v.* Dodge, 36 Me. 370.

2. St. George *v.* O'Connell, 110 Mass. 475.

3. Lewiston Steam Mill Co. *v.* Foss, 18 Atl. Rep. 288, 81 Me. 593; Barron *v.* Smith, 63 Vt. 121, 21 Atl. Rep. 269; Burroughs *v.* Wright, 19 Vt. 510; Closson *v.* Morrison, 47 N. H. 482; Scott *v.* Manchester, etc., Works, 44 N. H. 507; Higgins *v.* Drennan, 157 Mass. 384, 32 N. E. Rep. 354; Polley *v.* Lenox Iron Works, 15 Gray (Mass.) 513; Merrill *v.* Sawyer, 8 Pick. (Mass.) 397; Blanc *v.* Paymaster Mining Co., 30 Pac. Rep. 765, 95 Cal. 524; Kuhlman *v.* Orser, 5 Duer (N. Y.) 242.

Heavy plates of glass requiring skill to remove them safely, and which can not be removed except at unreasonable expense and considerable risk, may be attached in the manner provided in the statute for the giving notice by posting, filing copies, etc., and a deputy sheriff who has so attached it and has not taken it into his actual care and custody, may maintain an action for the conversion of it against a corporation whose officers, knowing of the attachment, have wrongfully caused it to be removed and sold within thirty days after the attachment. Foley *v.* Lenox Iron Works, 4 Allen (Mass.) 329. Furthermore, when an officer attaches chattels, which he immediately removes and keeps in his custody, and also chattels which can not be immediately removed, the attachment of the chattels not removed is valid under such a statute if he deposits in the town clerk's office a copy of the writ and of the return of the attachment of those chattels only. Arnold *v.* Stevens, 11 Metc. (Mass.) 258.

An officer does not, by relinquishing his possession of bulky personal

Fixtures which a tenant of the realty may remove may be attached as personalty.[1] But fixtures which can not be removed without being taken to pieces may, it seems, be attached as realty.[2] And it is said that a house, owned by the builder on land owned by another, may be attached in the manner in which real estate is attached without any actual possession being taken by the officer.[3]

Machinery and appurtenant articles come within the rule of ponderous chattels, and necessary acts should be done to give constructive notice to third persons.[4] But if no such notice is given, the attachment will yet be good as against purchasers from the defendant with knowledge of the attachment.[5] When the giving of notice is the requirement of the statute such notice must sufficiently describe the property and its situation as to unequivocally identify it.[6]

An unripe crop is personal property not susceptible of manual delivery, and, if it is sought to be attached, the levy must be made accordingly.[7]

Railroad cars are, under a Massachusetts statute, personal property for purposes of attachment, and an attachment made as prescribed therein, is valid.[8]

property attached, such as hay in a mow, on filing a certificate, etc., as required by statute, preclude himself from resuming possession, if necessary. Wentworth *v.* Sawyer, 76 Me. 434.

1. Morey *v.* Hoyt, 62 Conn. 542, 20 Atl. Rep. 127.

2. Gale *v.* Ward, 14 Mass. 352.

3. Ashmun *v.* Williams, 8 Pick. (Mass.) 402.

As to the proper manner of attaching a pew in a meeting house in Massachusetts, see Perrin *v.* Leverett, 13 Mass. 128; Sargent *v.* Peirce, 2 Metc. (Mass.) 80.

4. Fullam *v.* Stearns, 30 Vt. 443.

Machinery bolted to the freehold may be legally seized if the sheriff obtain full control of it. He need not detach and remove it, either to perfect his levy or to deliver possession on receipt of a forthcoming bond. Patch *v.* Wessels, 46 Mich. 249.

5. Rogers *v.* Gilmore, 51 Cal. 309.

6. Bryant *v.* Osgood, 52 N. H. 182; Norris *v.* Watson, 22 N. H. (2 Fost.) 364.

7. Raventas *v.* Green, 57 Cal. 254.

Serving the required notices and doing nothing further till the crop was ripe, when it was gathered by the officer can not be considered as an abandonment of the attachment. Raventas *v.* Green, 57 Cal. 254. See as to ripe crop, *supra*. What was not a sufficient levy upon a crop of corn which had ceased to grow but was not dry enough to crib, see Throop *v.* Maiden, 52 Kan. 258, 34 Pac. Rep. 801.

8. Hall *v.* Carney, 140 Mass. 131.

A ship or vessel is an article of personal property and (in the absence of special legislation to control such cases) must be attached as such. No valid levy can be made upon it if the debtor retains the possession and has the management thereof.[1] A sheriff has no right to take a vessel and cargo out of the possession of a consignee. He must serve copies of his writ, or give such notice as the statute may require, and he will have a lien in the first place for his demands as a creditor in possession.[2] Like other articles of personal property it can not be attached in its absence. A levy can not be made upon a vessel at sea by a return of the officer on a writ that he has attached the same so far as he has power to do, and by actual seizure of the vessel afterwards on her arrival at port.[3] When a vessel is lying at a wharf and the articles are not necessary to her safety, such articles as a boat, cable and anchor may be levied upon by an officer.[4]

Evidences of indebtedness are only susceptible of valid levy by being reduced to the manual possession of the sheriff. If they are in the hands of a third person who can not or will not deliver them up, he must be cited as garnishee. A debt not evidenced in writing is attached by making the debtor a garnishee. Without an actual seizure or citation in garnishment there can be no attachment.[5] Therefore if the property be intangible, it

1. Bridge *v.* Wyman, 14 Mass. 190.

In this case it was said that it was not necessary the officer should put a person on board to keep possession, but that it was essential that at least some person should be authorized and required by the officer to give notice in case a second attachment was attempted. Bridge *v.* Wyman, 14 Mass. 190.

2. Schepler *v.* Garristan, 2 Bay (S. C.) 224.

3. Bradstreet *v.* Ingalls, 24 Atl. Rep. 858, 84 Me. 276.

As to the proper manner in general of levying upon the shares or interest in a vessel, as well as upon the vessel itself, see Conn *v.* Caldwell, 6 Ill. (1 Gilm.) 531; Taacks *v.* Schmidt, 18 Abb. (N. Y.) Pr. 307; Seabrook *v.* Ruse, Riley (S. C.) Ch. 127.

4. Briggs *v.* Strange, 17 Mass. 405.

5. Woodworth *v.* Lemmerman, 9 La. Ann. 524. See also Kneeland *v.* Cowles, 4 Chand. (Wis.) 46; Pelham *v.* Rosep, 9 Wall. (U. S.) 103; Anthony *v.* Wood, 96 N. Y. 18, s. c. 67 How. (N. Y.) Pr. 424; and Naser *v.* First Nat. Bank, 116 N. Y. 492, s. c. 22 N. E. Rep. 1077.

If the officer seizes a demand it is his duty to collect it and hold it without waiting for an order of court or a termination of the suit. Davidson *v.* Chatham Bank, 32 Hun (N. Y.) 138.

But written instrument can not be

can not be attached by levy. There can be no seizure. Garnishment is the proper remedy.[1]

A judgment can not be attached by a seizure in the hands of a clerk of the court by which it was rendered; such clerk being merely a keeper of the records, he has no legal possession of, or control over it.[2]

Shares of stock in a foreign corporation can not, in the absence of a statutory provision therefor, be levied upon by a seizure of certificates within the state.[3] But where the stock has been assigned as collateral security, the attachment should be made by summoning the person in whose name it is held, as garnishee.[4]

Certificates of membership in a benevolent association, it seems, need not be taken into the actual custody of the sheriff; as, for example, where A was a member of a benevolent association, which, at the time of his death, had not issued any policy on his life, but was under a contract to his heirs at law to assess upon and collect the sum which each member had agreed to pay on the death of another member; a levy against one of such heirs at law of the deceased members was made by leaving a copy of the warrant and notice with the association and it was held that the sheriff was not obliged to take a certificate of membership in such association delivered by the association to the deceased member into his actual custody.[5]

legally attached, after having gotten possession upon the pretext of wishing to examine it. Van Volkenberg *v.* Bates, 14 Abb. (N. Y.) Pr. N. S. (note) 314.

1. See "Garnishment," *post*, Vol. II.

2. Daley *v.* Cunningham, 3 La. Ann. 55.

3. Armour Bros. Banking Co. *v.* Smith, 113 Mo. 12, 20 S. W. Rep. 690; Plymton *v.* Bigelow, 93 N. Y. 592, 63 How. (N.Y.) Pr. 484; Moore *v.* Gennett, 2 Tenn. Ch. 375. As to shares of stock in domestic corporation, see preceding section.

In Missouri the statute applies to domestic corporations only. Armour Bros. Banking Co. *v.* Smith, *supra*. As to Massachusetts, see Hussey *v.* Manufacturers', etc., Bank, 10 Pick. (Mass.) 415; Denney *v.* Hamilton, 16 Mass. 405; Lillard *v.* Porter, 2 Head (Tenn.) 177. As to Iowa see Commercial Nat. Bank *v.* Farmers', etc., Bank, 82 Iowa 192, 47 N. W. Rep. 1080; Clark *v.* Farmers', etc., Bank, 82 Iowa 192, 47 N. W. Rep. 1080.

4. Evans *v.* Brownscombe, (Pa. Com. Pl.) 8. Pa. Co. Ct. Rep. 456.

5. Hankinson *v.* Page, 31 Fed. Rep. 184. As to policies of insurance, see preceding section.

§ 210. (d) **On chattels intermixed with those of a stranger.** —Making a levy upon chattels intermixed with those of a stranger is attended with many perplexities and is surrounded with much uncertainty. The general rules, however, may be stated to be as follows: If the goods of the owner have been so intermixed with those of another person, by the act or knowledge of the owner, as to make it impossible for the officer to distinguish them, he will not be liable to an action of trespass for attaching them as the property of the other person; but if the owner points out the goods and demands them, it is the officer's duty to return them, and if he does not do so, but goes on with the attachment and sells them, it is a conversion.[1] The duty is upon the owner, if present when such attachment is made, to point out his portion and demand it and if he neglects to do so, the officer may seize and hold the property until such demand is made, or the property disposed of according to law.[2] And if the owner intervenes in the suit and claims the property, he must make a demand of the officer before his issue on the intervener is tried, or he can not hold the officer liable.[3]

However, the officer should make some effort by inquiry to ascertain which articles belong to the debtor and which to the other owner.[4] It is said in one case, however, that the demand of, and refusal by the owner to point out his goods is not sufficient to justify the taking thereof on a writ of another creditor, but that the owner must have been guilty of a fraudulent intent to frustrate the attachment by intermingling the debtor's goods with his own.[5]

But the fact that a furniture dealer intermingles furniture sold to him in fraud of creditors, without any unlawful motive

1. Shumway *v.* Rutter, 8 Pick. (Mass.) 443; Lewis *v.* Whittemore, 5 N. H. 364.

The rule is the same as to mortgaged property intermixed. Morrill *v.* Keyes, 14 Allen (Mass.) 222.

2. Taylor *v.* Jones, 42 N. H. 25; Albee *v.* Webster, 16 N. H. 362. See Robinson *v.* Holt, 39 N. H. 557.

3. Smokey *v.* Peters Calhoun Co., 66 Miss. 471.

4. Shumway *v.* Rutter, 8 Pick. (Mass.) 443; Carlton *v.* Davis, 8 Allen (Mass.) 94; Lewis *v.* Whittemore, 5 N. H. 364; Wilson *v.* Lane, 33 N. H. 466; Bond *v.* Ward, 7 Mass. 123.

5. Treat *v.* Barber, 7 Conn. 274.

on his part, does not entitle the creditors of the seller to attach the purchaser's whole stock of goods as the seller's property, without requesting him to point out the goods held under such sale.[1] And cattle are not so similar in appearance as to create such an uncertainty in the minds of those who know them as to destroy the right of attachment by intermingling them with others, and the attaching creditor, it is said, can learn who sold them and can have them pointed out in this case.[2]

If the owner exhibits to the officer a bill of sale of articles of the same kind with others with which they are intermixed, and all of which the officer has attached, the officer may select and return the least valuable of the articles corresponding with the bill of sale.[3]

In any event, whether it be the duty of the owner to point out his goods without being requested to do so by the officer about to make an attachment, or whether the officer is charged with making inquiry as to which belongs to the attachment defendant, yet it is undoubtedly true that a person who *wrongfully* produces a confusion of goods,—a cargo of "plank, boards and scantling," in this case,—by an unauthorized intermixture, forfeits his right to the whole, and his creditors can not levy an attachment on his interest in such goods while they are in possession of the first officer.[4] A party who willfully confounds the property of another with that of his own, so that the line of demarkation can not be discerned, assumes all the inconveniences of the confusion, and, generally, it is for him to distinguish his own property or lose it.[5]

The rule as to intermingled goods applies also to the officer who attaches them. If he seizes intermingled goods on a writ of attachment and allows the articles he sought to seize to remain intermingled with other goods of the debtor, and lays a claim to the whole so that another officer having a writ against

1. Smith *v.* Sanborn, 6 Gray (Mass.) 134.
2. Holbrook *v.* Hyde, 1 Vt. 286.
3. Shumway *v.* Rutter, 8 Pick. (Mass.) 443.
4. Beach *v.* Schmultz, 20 Ill. 186.
5. Weil *v.* Silverstone, 6 Bush (Ky.) 698; Loomis *v.* Green, 7 Me. 386; Hart *v.* Ten Eyck, 2 John. (N. Y.) Ch. 62; 2 Blackstone Com. 405; 2 Kent. Com. 365; Treat *v.* Barber, 7 Conn. 274; Robinson *v.* Holt, 39 N. H. 557; Smith *v.* Sanborn, 6 Gray (Mass.) 134.

the same debtor can not distinguish which has been attached, the latter officer will be justified in attaching the whole.[1]

Furthermore, it seems, that if by such intermingling of goods a new ingredient is formed incapable of division, the officer may attach the whole and the party who occasioned, or through whose fault or neglect occurs the wrongful mixture, must bear the loss.[2]

§ 211. (e) **On property owned jointly or in common with a stranger.**—A sheriff can not seize the goods of a partnership for the private debt of one and exclude the other partners from possession. He can only make a nominal seizure of the partnership property for the private debt of one copartner.[3] And while it seems he must seize and take possession of the entire levyable property, there being no difference between the levy in attachment and a levy of execution, in this respect,[4] and that if he deems it advisable to prevent their being wasted or carried away, he may take the goods into his actual custody or possession,[5] yet his possession is generally nominal and subject to the rights of possession of the other partners; and the interest which he can seize and sell is only the individual interest of the attachment defendant in the partnership assets after the rights and liens of other partners or tenants in common have been satisfied.[6]

1. Sawyer *v.* Merrill, 6 Pick. (Mass.) 478.

While this may seem to some to be an exception to the rule that property in custody of law can not be attached, yet it must be remembered that such property is not in the legal custody of the officer making the first attachment. His pretended attachment is wrongful.

2. Robinson *v.* Holt, 39 N. H. 557.

3. Morrison *v.* Blodgett, 8 N. H. 238.

4. Smith *v.* Orser, 43 Barb. (N. Y.) 187; Marshall *v.* McGregor, 59 Barb. N. Y.) 519.

5. See *ante*, § 49.

6. See cases cited in *ante*, § 47 *et seq.*

Where the attachment is sued out against the cotenants jointly on a joint demand, the ordinary rules governing levies against individuals will apply, but the fact that the debt is the debt of the copartnership, does not necessitate the attachment of the property of all the members of the firm. A creditor of joint debtors has a right to secure his claim by attaching the property of all or either of them. Marion *v.* Faxon, 20 Conn. 486.

Where two tenants in common are in possession, the proper method to make a levy seems, generally, to be to take possession of the defendant's half interest,[1] without excluding the other from his possession.[2] And if such a levy is made by a creditor of one of the persons owning such property jointly, and later such a levy is made by a creditor of the other, no controversy need arise between the attaching creditors, because they are not co-creditors attaching the same estate, but creditors of different debtors attaching different estates.[3]

The attachment of the interest of a co-tenant in land is governed by the same rules; but no questions of trespass are likely to arise if the sheriff seeks to sell only the interest of the attachment defendant. The fact that the interest of a tenant in common in land has been levied upon will not prevent other part owners from procuring a legal partition of the estate, nor will the partition destroy the lien obtained by the levy. The lien follows the part set off to the debtor. And if the attachment be followed by judgment, execution, and sale there-

1. Coulson *v.* Panhandle Nat. Bank, 54 Fed. Rep. 855; Brown *v.* Bacon, 63 Tex. 595; Clagett *v.* Kilbourne, 1 Black. (U. S.) 346.

2. Morrison *v.* Blodgett, 8 N. H. 238.

3. Pond *v.* Skidmore, 40 Conn. 213.

The rule requiring the removal of attached property by the officer is one of policy only, to prevent fraud, and does not apply where the possession is otherwise openly and notoriously changed. Property consisted of the furniture of a summer hotel upon a small island, was attached in the following manner: The attachment of A's interest was made in the winter, when the island was uninhabited and when it was very difficult to remove the property from it. The officer entered, attached the property, and left it locked up in the hotel, after having posted a notice of the attachment on the principal door. He afterwards visited the island from time to time to see that the property was safe, until the defendant, two months after, attached the interest of B in the property and took possession of a large portion of it. In trover brought by the first officer, the judge (after instructing the jury as to the necessity of an officer taking and holding possession) left it to them to determine from all the evidence whether the plaintiff had, under the circumstances, acted reasonably and properly in the course which he had taken to obtain and hold possession of the property. This was held to be correct. Pond *v.* Skidmore, 40 Conn. 213.

under it must be of the estate assigned to the debtor to be held in severalty and not as a common and undivided estate.[1]

Except where there has been a failure to give legal notice of the partition suit, to the party who has attached the interest of a tenant in common, in which case such party may rightly levy his execution as upon an estate in common.[2]

§ 212. (f) **On mortgaged property.**—A valid levy can not be made upon mortgaged chattels or pledged securities without taking them into the actual custody of the officer.[3] And where property under mortgage or pledge is sought to be levied upon, and the same is in the possession of the mortgagee or bailee, the officer has no right to attach and take the goods from the possession of such mortgagee or bailee, without first paying or tendering the amount due upon the mortgage or pledge.[4] But since the mortgagee or pledgee has only a lien on the property, the officer may, when the property is in the possession of the mortgagor, attach the mortgagor's interest without having either paid or tendered payment to the mortgagee, but if the mortgagee demand possession of the property, the officer must surrender it or deny the mortgagee's right and test the question.[5] But where the officer takes possession of the chattels as against everyone except the mortgagee, and the defendant is wholly divested of possession, the attachment will be good as against the *defendant*.[6] But the sheriff can not hold undisturbed possession against a prior mortgagee, even until the inventory is completed.[7]

When a creditor seeks to attach chattels of his debtor that

1. Argyle *v.* Dwinel, 29 Me. 29; M'Mechan *v.* Griffing, 9 Pick. (Mass.) 537.

2. Munroe *v.* Luke, 19 Pick. (Mass.) 39.

3. Warner *v.* New York Bank, 44 Hun (N. Y.) 374; Halben *v.* Reilly, 9 Daly (N. Y.) 271.

4. Barker *v.* Chase, 24 Me. 230; Wolfe *v.* Dorr, 24 Me. 104.

He can not do so even then, where the mortgagee and the attaching creditor are one and the same person. William Deering Co. *v.* Warren, 1 S. D. 35, 44 N. W. Rep. 1068.

5. Barber *v.* Smith, 41 Mich. 138; Baldwin *v.* Talbot, 46 Mich. 19; Harvey *v.* McAdams, 32 Mich. 472.

6. Myers *v.* Cole, 32 Kan. 138.

7. Rosenfield *v.* Case, 49 N. W. Rep. 630, 87 Mich. 295; Merrill *v.* Denton, 73 Mich. 628, 41 N. W. Rep. 823.

are under mortgage to a third person, he has the option to proceed in either one of two ways: (1) by seizing the entire property covered by the mortgage and paying or tendering the amount due thereon; or (2) by simply levying on the right or equity of redemption of the mortgagor subject to the rights of the mortgagee.[1] When the levy is made subject to the mortgagee's interest, the validity of the mortgage liens is thereby recognized, and the officer can not then hold exclusive possession of the mortgaged property on the ground that the mortgage is being used to the fraud of the creditors. And under such a levy, if the officer hold exclusive possession, he will have no defense in an action of replevin, brought by the mortgagees, unless the value of the goods exceeds the amount of the mortgages, even though nothing is due on them.[2] If, however, the mortgage on the property taken by the sheriff is afterwards foreclosed, and the mortgagee, at the foreclosure-sale, bids an amount sufficient to cover not only the mortgage debt, but an unsecured debt of the mortgagor to the mortgagee, the excess will be bound by the lien of the attachment in question.[3]

In New York, an attachment of the pledgor's interest in merchandise pledged is sufficiently levied upon by serving certified copies of the attachment upon the pledgee, and by proper notices showing the attachment of the property.[4]

1. Mooney *v.* Broadway, (Ariz.) 11 Pac. Rep. 114.

2. Rosenfeld *v.* Case, 49 N. W. Rep. 630, 87 Mich. 295.

3. Harvey *v.* Foster, 30 Pac. 849, 64 Cal. 296.

If one who has a lien on goods which are attached in his hands, receipts for them to the officer, under an agreement that he shall continue to retain them for his lien, and they are afterwards attached at his own suit, and he receipts for them, still asserting his lien, his lien is not thereby discharged. Townsend *v.* Newell, 14 Pick. (Mass.) 332.

Where an attachment has been made on a writ against one who did not own the property, and replevin is brought by the owner, the officer might defend his detention of the property as servant of the party who had the lien, though the attachments were void. He may also prove by parol evidence that he attached subject to the lien, though no mention of it be made in the receipts nor in his returns. Townsend *v.* Newell, 14 Pick. (Mass.) 332.

4. Lane *v.* Wheelwright, 23 N. Y. S. 576, 69 Hun (N. Y.) 180.

§ 213. (g) On exempt property.—As hereinbefore shown,[1] property which is made exempt from execution by the laws of the state can not be attached; but the exemption laws are local and can only protect the exempt property so long as it remains in the state.[2] If the sheriff should attach property which is shown to be exempt, he must release his levy and permit the owner to retake possession of it.[3] Although the debtor may be entitled to claim his exemption, he may waive the privilege and consent that the property may be attached. He may waive his privilege of exemption either by his acts or by his neglect to act. Where he neglects to make a demand to have his exempt property (the same being a parcel of a larger quantity) set apart before or at the time of the levy, he waives his privilege.[4] It has been said that he is not bound to interpose his claim to exempt property when the writ is served on him, that it comes in time if with the filing of his appearance in the case; provided the plaintiff has not suffered from want of notice or the claim.[5]

A locked trunk containing some exempt goods may be taken into the possession of the officer, it seems, after he has given

1. See *ante*, § 64.

2. Boykin *v.* Edwards, 21 Ala. 261.

In Alabama a levy on personal property, claimed to be exempt, is invalid unless the bond and affidavit required by the code be first given. Totten *v.* Sale, 72 Ala. 488.

3. Servanti *v.* Lusk, 43 Cal. 238.

If the officer refuses to release the property without a "bond for release," he will exceed his authority. Any such bond which he may extort will be void. Servanti *v.* Lusk, 43 Cal. 238.

4. Smith *v.* Chadwick, 51 Me. 515.

But if articles to be attached are plainly distinguishable as tools and implements of the debtor's business, no demand or designation thereof, at the time of the attachment, is necessary in order to enable the debtor to maintain an action against the attaching officer for damages. Woods *v.* Keyes, 14 Allen, (Mass.) 236; Howard *v.* Williams, 2 Pick. (Mass.) 80.

As to the compulsion of the officer to take notice of what goods are exempt under the statute, see *ante*, § 74, "What Property may be Reached."

But where articles used as provision are not set apart to be used by the debtor's family from others of the same kind kept for sale by the debtor, the officer may levy upon the whole. Nash *v.* Farrington, 4 Allen (Mass.) 157.

5. Landis *v.* Lyon, 71 Pa. St. 473.

Hence, any defect in the statement in his claim made to the sheriff at the time of the service does not embarrass his enforcing it when subsequently and properly interposed. Landis *v.* Lyon, 71 Pa. St. 473.

the owner an opportunity to remove the exempt articles from the trunk. He may then retain such articles until they are called for by the owner, and if he then delivers them to the owner no action will lie against him for the taking.[1]

If the debtor be temporarily absent, his wife, or other person left in charge, is authorized to claim the benefit of the exemption laws for him.[2]

The levy of an attachment on a parcel of land in which the debtor has a homestead creates no lien except on the excess.[3]

If an action of replevin has been brought against the officer to recover goods attached by him, and he has successfully defended the same, he can not thereafter deny the title of the debtor, in an action to recover the same goods, on the ground that they were exempt from attachment.[4]

The exemption from attachment is a personal privilege, and must be claimed by the person entitled thereto.[5]

§ 214. (h) **On land.**—When there is no positive limitation of the right of attachment a levy may be as well made upon real property as upon personal property; and the existence, within the knowledge of the officer, of a sufficiency of personal property which he might seize will not invalidate the attachment of the land. An attachment of land is sufficient when the levy is so made as to confer jurisdiction on the court.[6]

1. Towns *v.* Pratt, 33 N. H. 345.

2. McCarthy's Appeal, 68 Pa. St. 217.

3. Mayers *v.* Paxton, 14 S. W. Rep. 568, 78 Tex. 196.

4. Foss *v.* Stewart, 14 Me. 312.

5. See *ante*, § 72.

A building which was owned by a debtor, but which stood on another's land, has been attached in the manner provided for the attachment of real estate. Ashmun *v.* Williams, 8 Pick. (Mass.) 402.

6. Boggess *v.* Gamble, 3 Coldw. (Tenn.) 148.

Wisconsin only provides for the attachment of land when no personal property can be found subject to levy. It is therefore essential to the validity of the title acquired by the sheriff's deed that it should appear, from the return, that the defendant had no goods and chattels subject to levy. Vilas *v.* Reynolds, 6 Wis. 214.

In Arkansas, under a similar statute in an attachment before justices of the peace, it was held that where the constable's return showed that he could find no personal property on which to levy, it was not necessary, before selling the land levied on, that the affidavit by plaintiff that defendant had no personalty subject to levy, required by another section to be filed

Whatever interest in land may be seized on execution may be seized on attachment; the rule in this regard being the same as that applicable to personal property; and, in the absence of any statutory provision to the contrary, it may be as well seized in the first instance as to await the exhaustion of the personal property. Any interest in land susceptible of being made the subject of a lien is susceptible of attachment. Other states are approaching, if they have not already adopted, the rule laid down in California, that "land" embraces all titles, legal or equitable, perfect or imperfect, including such rights as lie in contract; and those which are executory as well as those which are executed.[1] In Tennessee the right which the debtor has to redeem land from a judicial sale may be attached.[2] In Alabama, however, it is said that a vested remainder can not be seized, in the possession of the tenant for life.[3]

The attachment of real estate is almost entirely symbolical. The officer gets no possession of it, and the occupant is not dispossessed.[4] The officer gets no property or right of possession in real estate.[5] And it is not necessary for him to enter upon the land in order to make a levy upon it.[6] Nothing more is requisite than the doing of some act by the officer with intent to make the property liable to the process.[7] It is not necessary, even as against a *bona fide* purchaser, that the officer should take actual possession of the property, nor that he should go near it, nor see it, but he must do some act, make some entry or memorandum indicative of his intention; and when he has done this, with a fixed purpose in his own mind, he has made a legal levy. Simply making a return that he

before selling realty on attachment, should have been filed. Webster *v.* Daniel, 47 Ark. 131.

1. Fish *v.* Fowlie, 58 Cal. 373. Compare Chitty's Pl. 174; 2 Blackstone's Com. 16; 3 Blackstone's Com. 217. See Buhl *v.* Kenyon, 11 Mich. 249.

2. Herndon *v.* Pickard, 5 Lea (Tenn.) 702.

3. Good *v.* Longmire, 35 Ala. 668.

4. Perrin *v.* Leverett, 13 Mass. 128; Smith *v.* Collins, 41 Mich. 173.

5 Scott *v.* Manchester, etc., Co., 44 N. H. 507.

6. Crosby *v.* Allyn, 5 Me. (5 Greenl.) 453; Taylor *v.* Mixter, 11 Pick. (Mass.) 341.

7. Rodgers *v.* Bonner, 45 N. Y. 379.

has attached is sufficient.[1] But in some states, as against *bona fide* purchasers, a publication of notice, or the recording of a certificate of the attachment, is necessary.[2] If the return is certain on its face and conforms substantially to the requirements of the statute it is sufficient.[3] The return (the indorsement on the writ) should describe the real estate levied upon with that certainty which would be sufficient in a deed of conveyance, lest the levy be void.[4] If, however, certainty can be shown from other facts, the defect may be cured, as for instance where an attachment was laid on a part of a certain tract without designating the part, the defect in itself would have invalidated the levy, but it was rendered sufficient by proof that the defendant in attachment had previously conveyed all of the tract except the number of acres upon which the attachment was laid.[5] Parol evidence is admissible to show what parcel was intended.[6] A general attachment of all the interest of the debtor in any real estate in the county will hold real estate fraudulently conveyed by the debtor by a deed which has been duly recorded.[7] Return on an attachment of "All the real estate owned by the defendant in the county of K" will hold the property, although the defendant sold all the property by an unrecorded deed.[8] Even in the attachment of a vacant lot of ground, it is unnecessary that the sheriff should take possession of the property attached by the actual and corporeal detention thereof. The execution of the writ has the legal effect of vesting in him the civil possession of the defendant.[9]

1. Burkhardt *v.* McClellan, 1 Abb. (N. Y.) App. Dec. 263, 15 Abb. (N. Y.) Pr. 243, note; Rodgers *v.* Bonner, 55 Barber (N. Y.) 9; Taylor *v.* Mixter, 11 Pick. (Mass.) 341; Hancock *v.* Henderson, 45 Tex. 479.

2. See below.

3. Saunders *v.* Columbus Life Ins. Co., 43 Miss. 583.

The court will not intend facts inconsistent with the return, tending to make it void. Strict compliance with the language of the statute is not required. A substantial compliance is sufficient. Saunders *v.* Columbus, etc., Co., 43 Miss. 583.

4. Biggs *v.* Blue, 5 McLean (U. S.) 148; Clark *v.* Ward, 12 Gratt. (Va.) 440.

5. Biggs *v.* Blue, 5 McLean (U. S.) 148.

6. Whitaker *v.* Sumner, 9 Pick. (Mass.) 308.

7. Pratt *v.* Wheeler, 6 Gray (Mass.) 520.

8. Moore *v.* Kidder, 55 N. H. 488.

9. Boyle *v.* Ferry, 12 La. Ann. 425.

The only possible circumstance which would justify the officer in taking corporeal possession of the land, to the exclusion of the defendant or other person in possession, is the reasonable apprehension of injury to the property itself. But this he can not then do unless he is expressly directed by order of the court.[1]

The officer does not, by the levy on real estate, acquire any right of property in, or possession of, the land,[2] as he does when he levies upon personal property.[3] His levy simply creates a lien upon the real property in favor of the attaching creditor from the date of the levy,[4] and although he attaches but an equity in the real estate, his attachment creates a lien thereon.[5] However in Louisiana, where the sheriff seized and sold "all right, title and interest of the debtor in a lot of ground" owned by him, but which was encumbered by a mortgage, it was considered as a seizure and sale of the property itself, and not of the contingent right of the debtor to so much of the property as might remain after the mortgages were satisfied, and that, as the title passed at the sale, the mortgagee must look to other proceedings.[6] It has, however, been said in Connecticut that it is not when the real estate is levied upon that the lien is created, but that it is effected when that notice is given to the defendant which makes him a party; because it is the service of the writ of attachment which constitutes the commencement of a suit.[7]

1. Wood *v.* Weir, 5 B. Mon. (Ky.) 544.

2. Scott *v.* Manchester, etc., Works, 44 N. H. 507.

3. See *ante*, § 208.

4. State *v.* Cornelius, 5 Ore. 46.

5. Moulton *v.* Stowell, 16 N. H. 221; Burkhardt *v.* McClellan, 15 Abb. (N. Y.) Pr. 243, note; Chandler *v.* Dyer, 37 Vt. 345.

He has, however, by virtue of his attachment, a right to redeem the land from a prior encumbrance in order to make his own claim beneficial and available to himself, and this even before judgment is rendered and execution thereon is levied. As an attaching creditor he has the same right to redeem as the mortgagee has. Their liens are equal in efficiency. Chandler *v.* Dyer, 37 Vt. 345. See further as to "Liens," *post*, § 313.

6. Trudeau *v.* McVicar, 1 La. Ann. 426.

7. Sandford *v.* Dick, 17 Conn. 213.

Therefore, where the statute of limitations on the claim expired on the second of March, a writ of attachment was issued and levied on the real estate of the defendant the

§ 215. Levy of ancillary attachment — "Attachment in aid."—All attachment proceedings are in one sense ancillary, for they are in aid of a suit for the collection of a debt; but the line of demarkation,—not well indicated in some states,—between what is termed an "Original Attachment" and an "Ancillary Attachment" is, that the term "Original Attachment" contemplates that the proceeding is begun with the present intention of acquiring a lien by levying an attachment, while the term "Ancillary Attachment" contemplates that the main action has been theretofore begun by an ordinary personal writ of summons, without any intent at the time of suing out, or resorting to, a writ of attachment to aid it; "Original Attachment" intends a writ of attachment from the inception of the suit, while "Ancillary Attachment" does not so intend, but resorts to it thereafter.

Ancillary attachment is applicable only to a limited class of cases, but within its limits it rests upon its own facts and not upon the facts of the original action.[1] The same precision is necessary in following the requirements of the statutes in regard to the affidavit, bond, writ, service and return as is requisite in the bringing of original attachment. Yet it seems almost useless to state, a failure to sustain the attachment because of defects in one or more of these will have no effect whatever upon the original suit.

It is well to observe that some statutes require the service of summons in the original suit before permitting the writ to issue in the attachment case, and under such a statute, where the summons has been issued against a number of defendants, and is returned without service on some of them, an affidavit and bond can not be filed in the suit, and an attachment sued out against the defendants who have not been served.[2]

Some statutes require that the principal suit be pending in

twenty-eighth of February preceding, but no copy was left with the defendant or at the clerk's office until the fourth of March; it was held that the action was not brought within the time required, and consequently the plaintiff's claim was barred by the statute of limitations. Sandford *v.* Dick, 17 Conn. 213.

1. Reed *v.* Maben, 21 Neb. 696, 38 N. W. Rep. 252.

2. McDonald *v.* Smith, 24 Ark. 614.

fact before the issuing of an ancillary attachment in certain cases, but that the affidavit and the writ must allege that a suit has been commenced by the plaintiff against the defendant, the nature thereof, the tribunal in which it is pending, the amount of the damages laid in the action, and that the cause of action is just.[1] Others do not require the allegation of the existence of the previous suit.[2] Under a statute providing for the issuance of ancillary attachment, "when a suit shall be commenced in any circuit or county court," it was said that it might issue, although the leading process had not been executed; and that the failure to serve the writ upon the defendant would not abate the attachment or impair its efficiency, but that the plaintiff might proceed to judgment as in other cases.[3] But under another statute it was held that the mere issuing of summons was not a commencement of an action, for general purposes, and that until it is *served* in case of a non-resident, so as to give the court jurisdiction of the person of the defendant, no attachment against his property can be issued.[4] And

1. Smith *v.* Foster, 3 Coldw.(Tenn.) 139; Thompson *v.* Carper, 11 Humph. (Tenn.) 542.

A writ of ancillary attachment must so identify the suit in aid of which it is issued as to show upon its face that it forms an adjunct of that particular suit. Lewis *v.* Woodfork, 2 Baxter (Tenn.) 25; Peak *v.* Buck, 59 Tenn. 71. And the words in the writ "ancillary to a suit at law this day commenced," without notice therein given to the defendant of the nature of the suit, the parties thereto, or of the tribunal in which the suit is pending, will not be sufficient. Woodfolk *v.* Whitworth, 5 Coldw. (Tenn.) 561.

2. Hounshell *v.* Phares, 1 Ala. 580.

When the writ of attachment is sued out subsequently to the institution of the original action, a separate petition or affidavit is generally required — Shapleigh *v.* Roop, 6 Iowa 524—unless the same is asked for in the petition. Queen *v.* Griffith, 4 Greene (Iowa) 113; Dawson *v.* Jewett, 4 Greene (Iowa) 157. Consult and follow carefully the controlling statutes; and as to affidavit and bond generally, see *ante*, §§ 127 and 153.

In Indiana, in attachment suits, the affidavit may contain the requisites both of a complaint and affidavit, so as to dispense with any separate complaint. Dunn *v.* Crocker, 22 Ind. 324.

3. Morgan *v.* Lamar, 9 Ala. 231.

When an ancillary attachment in aid of a suit is sued out, the grounds upon which it issues can not be traversed or put in issue by the defendant in the main action. Jones *v.* Donnell, 9 Ala. 695. See "Dissolution of Attachment," *post*, § 326.

4. Kerr *v.* Mount, 28 N. Y. 659. Compare Treadwell *v.* Lawlor, 15 How. (N. Y.) Pr. 8.

In Illinois, an attachment in aid of

under a statute providing that "when any suit is instituted," etc., the plaintiff may, "on affidavit," etc., forthwith sue out an attachment; it was held, that the affidavit might be made any time before the abatement of the suit against a non-resident by a return of the officer.[1] The return on the summons, that the defendant could not be found in the officer's county, abates the suit then instituted, and an ancillary writ of attachment can not thereafter be obtained.[2] Such is the general intendment of the statutes regarding ancillary attachment. Its purpose is to aid the suit then pending and it is a competent writ at any time during the pendency of the suit, before judgment.[3]

The service of the writ in an ancillary attachment is governed by the same rules as in an original attachment, except that inasmuch as an ancillary attachment is brought in aid of a suit theretofore begun by personal service, no personal service is required of the ancillary writ. The levy upon the property and the return is all that is required.[4] But where there has been no personal service on the defendant in the main action, no judgment can be rendered on the ancillary attachment without personal service upon the defendant,[5] or such other acts as the statute requires for the getting of jurisdiction. The statute of Illinois provides that upon the return of an attachment, pending a suit, when there has not been personal service in such suit, notice of the pendency of the suit and of the

a suit at law may issue at any "time," although the revised statutes, in revising a previous law, where the word "time," as it stood in the original act on file, was erroneously printed "term," adopted the error of the misprint. Dutcher *v.* Crowell, 10 Ill. (5 Gilman) 445.

An attachment may be issued in aid of a *sci. fa.*, to make a defendant, who has not been served with process, a party to a judgment recovered against his codefendant. Ryder *v.* Glover, 3 Scam. (Ill.) 547.

1. Pulliam *v.* Aler, 15 Gratt. (Va.) 54.

2. Steele *v.* Harkness, 9 W. Va. 13; Murray *v.* Hamilton, (Ky.) Hard. 5.

3. After judgment the writ of execution is the proper process.

As to an attachment on a judgment and as to its being on the same footing with writs of *fi. fa.* or *ca. sa.* and *ci. fa.* in regard to its issue, see Boyd *v.* Talbott, 7 Md. 404.

4. Rutledge *v.* Stribling, 26 Ill. App. 353; Bailey *v.* Valley Nat. Bank, 19 N. E. Rep. 695, 127 Ill. 332.

5. Moore *v.* Hamilton, 7 Ill. (2 Gilman) 429.

issue and levy of the attachment shall be given as in cases of original attachment.[1]

When the main action is begun against joint promisors, who are not partners, an attachment may be had against the property of one of them only.[2]

Some statutes relating to the service of ancillary attachment are broad enough, not only to allow it where the suit is commenced by summons or *capias ad respondendem*, but where the original attachment is the leading process in the cause. However, where the property held under the original writ is amply sufficient to satisfy the plaintiff's demand the ancillary writ will perhaps be quashed.[3] The delivery to the defendant of the summons or copy, in the service of a writ of attachment, is not a part of the attachment itself, but is necessary to *complete* the service of the writ, and to require the defendant to answer to the action.[4] If there be no such service of summons, the attachment fails, and a deed made after the levy will convey the land free from the attachment lien, though executed prior to the expiration of the time for the service of the summons.[5]

Summoning the Defendant—Constructive Service—Publication.

§ 216. **Necessity of service or constructive service.**—A very old maxim states, that every man is entitled to his day in court, and it is a well established principle that no personal

1. Rev. Stat., Chap. 11, § 31; Rutledge *v.* Stribling, 26 Ill. App. 353; Bailey *v.* Valley Nat. Bank, 127 Ill. 332, 19 N. E. Rep. 695.

2. Patterson *v.* Stiles, 6 Iowa 54.

3. Brown *v.* Isbell, 11 Ala. 1009.

It was said in one case that, although an attachment must be signed by the judge granting it, it was not necessary that the copy served should have a copy of the judge's signature subscribed to it. Greenleaf *v.* Mumford, 19 Abb. (N. Y.) Pr. 469, 30 How. (N. Y.) Pr. 30. But such omission can not be pronounced anything else than bad practice.

4. Kittredge *v.* Emerson, 15 N. H. 227.

Under a statute which provided that a levy on personalty must be made "by taking the same into the sheriff's actual custody," and that a copy of the warrant must without delay be delivered to the person from whose possession the property is taken, the levy is complete at the time of the taking. Adams *v.* Speelman, 39 Hun (N. Y.) 35.

5. Kincaid *v.* Frog, 31 Pac. Rep. 704, 49 Kan. 766.

judgment can be rendered against a defendant, who has not been personally summoned to appear, or who does not voluntarily appear to defend himself.[1] Therefore, in all attachment cases there must be a personal service of summons, or a personal appearance, before a court can acquire jurisdiction to enter a *personal* judgment; and to quash the summons will put an end to the suit, and an attachment made on the writ will necessarily fail with it.[2]

In all attachment acts, an effort is made to overcome the

1. Pennoyer *v.* Neff, 95 U. S. 714.

2. Paul *v.* Bird, 25 N. J. L. 559; Stanley *v.* Stanley, 35 S. C. 584, 14 S. E. Rep. 675. See as bearing upon this point in regard to quashing garnishee summons, Burlingham *v.* Cole, 13 Gray (Mass.) 271.

Under a statute requiring the official to read the writ to the defendant named therein, or deliver to him a true copy thereof, a personal service can not be made in any other than one of these two ways. The sheriff can not cull out such parts as he may deem material and read them to the defendant, omitting the rest and thereby make a good service. Cary *v.* Barber, 1 Colo. 172. See also Great West. Mining Co. *v.* Woodmas of Alston Mining Co., 12 Colo. 46, 20 Pac. Rep. 771.

A special agent, authorized to settle a particular debt only, is not such an agent that process to commence an attachment upon the debt can be served upon him instead of the principal. Fulsom *v.* Conner, 49 Vt. 4.

Nor is the agent of a foreign insurance company sent out to solicit writs such an "agent" as is required by the statute relating to the service of attachment. A sheriff's return setting forth neither the agent's special character nor place of business, will not be conclusive. Liblong *v.* Kansas Fire Ins. Co., 82 Pa. St. 413. Further as to requisites of service in Pennsylvania see Vandergrift's Appeal, 83 Pa. St. 126.

But leaving a copy of the citation and petition with the debtor's wife, at his residence, has been held to be sufficient. Thomas *v.* Wetzler, 4 La. Ann. 184; Giles *v.* Hicks, 45 Ark. 271.

In an attachment of a debt due from a corporation, service of process should be made upon such officer of the corporation as is requisite to bind the corporation in an ordinary suit against him. Under the Virginia code, where the corporation is a town or city, service may be made on the mayor, or, in his absence, on the president of the council, or of trustees, or, if both be absent, on an alderman or trustee. But service on the auditor, without appearance by the city or creditor, was held not to give the court jurisdiction of the debt which the city owed to the creditor. Alexandria *v.* Fairfax, 95 U. S. (5 Otto) 774.

Service of a writ upon a school district, by attaching certain personal property of the district and leaving a true and attested copy of the writ, with the officer's return thereon, at the house of the then usual abode of the clerk of such district in the hands of his wife, has been held to be good. Dow *v.* School District No. 12, 46 Vt. 108.

necessity of personal service by providing for the performance of certain acts which are deemed to be constructive service. The extent to which the courts generally hold that such a constructive service gives jurisdiction of the person of the defendant, is, that the court acquires jurisdiction of him to the extent that the attached property is subject to any judgment that may be rendered against him.[1] Constructive service will not be permitted where personal service is possible. The officer is bound to use diligence to secure the best service, and may not adopt an inferior service until after he has used reasonable diligence throughout the whole time allotted for superior modes, without avail.[2] The effect of this constructive notice is to give the court jurisdiction of the property of the defendant which has been levied upon under the writ of attachment within the jurisdiction; *i. e.*, power to dispose of the property; but for all other purposes than the acquirement of jurisdiction to render personal judgment to the extent of the value of the property seized, and power to dispose of the *res*, such an effort toward constructive service, or in substitution of personal service, is a nullity.

The performance of the acts required by the statute to make a constructive service are only effective in giving the court

1. Gibson *v.* Everett, 41 S. C. 22, 19 S. E. Rep. 286; Thomson *v.* Shackelford, 6 Tex. Civ. App. 121, 24 S. W. Rep. 980.

2. Town *v.* Tabor, 34 Mich. 262.

The Lousiana code permits the attachment of the debtor's property in whatever hands it may be found, and the attachment is effective by service of the process upon the person having such property in his possession. Grieff *v.* Betterton, 18 La. Ann. 349.

In New Hampshire, when no attachment is made, the writ of attachment may be served by copy. Chase *v.* Kent, 61 N. H. 76.

A copy of the writ and not of a summons must be served upon the principal and not the agent when the goods or estate of the principal are attached. Bell *v.* Somerby, 8 N. H. 64.

And in Michigan the return of an attachment must show that the officer served a certified copy of the inventory of the property seized on either the principal defendant or owner of the property attached, or the proceedings will be void. White *v.* Prior, 88 Mich. 647, 50 N. W. Rep. 655; Langtry *v.* Wayne Circuit Judges, 68 Mich. 451, 36 N. W. Rep. 211.

But in Georgia the law does not prescribe any such notice in an attachment of a house and lot occupied by a third person under claim of title, as serving a copy upon the occupant to bind him. Guernsey *v.* Reeves, 58 Ga. 290.

complete jurisdiction of an action *in rem*. After the constructive service is had upon the defendant, by publication of notice as required by the statute, the court has obtained such complete control of the property seized on the attachment, that the rights of purchasers of the property at the sale on execution will be protected.[1] In fact, the defendant himself is before the court for all purposes, except the rendition of a personal judgment against him generally.[2]

The practitioner must, however, remember that the most essential requisite to the jurisdiction of the court, in a proceeding under a statute providing for the levy of writs of attachment upon the property of absent defendants and publication of warning to them to appear, is the *levy* of the writ of attachment. Such a proceeding being *in rem*, the court can not dispose of the property, unless the property is properly within the court.[3] There is not likely to be any waiver of defects and irregularities, by the personal appearance of the defendant, and it is incumbent upon the practitioner, therefore, to see that every preliminary step is in exact compliance with the controlling statute, or his efforts, even after judgment, may be defeated by a collateral attack.

§ 217. **The purpose of publishing notice.**—Natural justice requires that a person shall have notice of some kind before his property can be bound by judicial sentence.[4] The object of the notice to an absent defendant is said not to be for the purpose of giving the court jurisdiction of the writ and subject-

1. Bliss *v.* Heasty, 61 Ill. 338; Smith *v.* Yargo, 28 Ill. App. 594.

2. King *v.* Vance, 46 Ind. 246. See, also, Newman *v.* Cincinnati, 18 Ohio 323; Morgan *v.* Burnet, 18 Ohio 535; Meyer *v.* Keith, 99 Ala. 519, 13 So. Rep. 500.

And in Georgia the plaintiff in attachment of chattels for purchase-money may, by giving the notice prescribed in the code, become entitled to a general judgment against the defendant. Sutton *v.* Gunn, 86 Ga. 652, 12 S. E. Rep. 979.

3. Cooper *v.* Reynolds, 10 Wall. (U. S.) 308.

4. Haywood *v.* Collins, 60 Ill. 328.

The attachment law of Illinois requires this notice to be either by personal service or by publication. Haywood *v.* Collins, 60 Ill. 328.

But leaving the state temporarily does not make necessary any other service upon the defendant than levying a copy of the summons at his house with a member of his family. Giles *v.* Hicks, 45 Ark. 271.

matter, but to inform the defendant of the proceeding and give him an opportunity to defend.[1]

The court acquires jurisdiction to issue the writ, by the affidavit, bond, etc., and acquires jurisdiction of the property by its seizure, within the territory controlled by the attachment statutes. The jurisdiction over the subject-matter in attachment cases can only be obtained by the levy of a writ properly issued. The presence or absence of the defendant is immaterial in regard to the jurisdiction of the property. Therefore, the fact that the defendant, after entering a motion to quash a defective writ, appears on the trial of a plea in abatement, will not bind the defendant the same as though there had been a valid writ.[2] There must, however, be jurisdiction of the person of the defendant, in some of the modes known to the statute, for without it the judgment will be void, and its validity may be questioned collaterally.[3] The publication of notice is intended to be a constructive personal service, and is effective as such for the rendition of a judgment on the personal demand, to the extent of the value of the property seized. But unless the prescribed notice is duly made, the attachment is wholly void.[4] The notice required by the statute is not a pro-

1. Williams *v.* Stewart, 3 Wis. 678.

If he appear and traverse the matter of the affidavit, this object is attained, and the court can not dismiss the case on account of the insufficiency of the notice. Williams *v.* Stewart, 3 Wis. 678.

And where a defendant brings replevin as soon as the attachment is served, the sheriff need not proceed to advertise the levy, because the only object of such advertisement is to induce the appearance of the defendant, and this is effected by the replevin. Reynolds *v.* Jordan, 19 Ga. 436.

No notice to the absent defendant or advertisement is necessary in Alabama when the judgment is not rendered until after the expiration of six months from the issuance of the attachment. Bickerstaff *v.* Patterson, (Ala.) 8 Porter 245; Murray *v.* Cone, 8 Porter (Ala.) 250; Fleming *v.* Burge, 6 Ala. 373. Further as to notice to non-residents and the application of the provision to cases of fraudulent disposition of property, see Dollins *v.* Pollock, 7 So. Rep. 904, 89 Ala. 351.

2. Smith *v.* Hackley, 44 Mo. App. 614.

3. Haywood *v.* Collins, 60 Ill. 328; Firebaugh *v.* Hall, 63 Ill. 81.

4. Cummings *v.* Tabor, 61 Wis. 185.

As bearing upon this point, see Fitzimmons *v.* Marks, 66 Barb. (N. Y.) 333; Phelps *v.* Baker, 60 Barb. (N. Y.) 107; Pawling *v.* Bird, 13 Johns. (N. Y.) 192; Robinson *v.* Ward, 8 Johns. (N. Y.) 86; Webster

cess in its proper sense, but is merely a paper communicating information to the defendant of the issuance and levy of an attachment. The authority of the sheriff to give notice depends upon the fact of such issuance and levy.[1] Where the defendant in the attachment proceedings can be found, it is generally the duty of the officer serving the writ to summon him.[2] But if he does not reside, or can not be found in the state, the suit may be proceeded in by publication.[3] In theory, at least, it is only when the defendant is beyond the reach of a summons, that the resort may be had to the publication of notice as a substitution of service.[4] When there is or can be no direct per-

v. Reid, 11 How. (N. Y.) Pr. 437; Manchester *v.* McKee, 9 Ill. 511.

In Texas, in a suit to try the right of property claimed by defendant, which had been attached by the plaintiff in an action against another, the plaintiff offered in evidence the judgment in his favor in the suit against such other person. This was objected to on the ground that it was a personal judgment, and had been rendered upon citation by publication without the appearance of defendant. The court said that the attachment having issued in an action to foreclose a mortgage, the service of publication was sufficient to give the court jurisdiction to render a judgment which in legal effect subjected the attached property to the payment of the debt sued on. Harris *v.* Daugherty, 74 Tex. 1, 11 S. W. Rep. 921.

1. Rice *v.* Clements, 57 Ala. 191.

When these facts exist, the notice in compliance with the statute will be good, and although the plaintiff be then dead, a judgment will not be prevented. Rice *v.* Clements, 57 Ala. 191.

2. Drysdale *v.* Biloxi Canning Factory, 67 Miss. 534, 7 So. Rep. 541.

3. Magrew *v.* Foster, 54 Mo. 258.

In North Carolina an affidavit which fails to show that the defendant "can not, after due diligence, be found in this state," does not warrant an order of publication. Faulk *v.* Smith, 84 N. C. 501.

In New York an affidavit to obtain an order for service of the summons by publication which averred that the plaintiff would be unable, with due diligence, to make personal service within the state, because he could not be found therein and resided in another state, where his place of business was, this was held to be sufficient proof of inability to make personal service, and the attachment was sustained on a motion to vacate. Matthews *v.* Gilleran, 12 N. Y. S. 74, 58 Hun (N. Y.) 607.

4. As for example of what is required:

The California code prescribes that before jurisdiction can be obtained by publication, it must be made to appear by affidavit that the defendant resides out of the state or has departed, or can not, after due diligence, be found in the state; or that he conceals himself to avoid the service of summons, etc. If this affidavit be insufficient, no jurisdiction will be acquired. Braly *v.* Seaman, 30 Cal. 610.

In Michigan a substituted service on the ground that the defendant can not

sonal service, the publication of notice, as required by the statute, must then be resorted to; and such publication must be made in strict accordance with the provisions of the attachment statutes, or the court will not acquire sufficient jurisdiction to render judgment therein. Mere irregularities in the publication do not, however, always defeat the jurisdiction of the court in proceedings by original attachment.[1] Irregularities may often be amended.[2]

be found can not be made until after the time has expired for the making of personal service; *i. e.*, six days before the return day. Hubbell *v.* Rhinesmith, 85 Mich. 30, 48 N. W. Rep. 178; Nicolls *v.* Lawrence, 30 Mich. 395.

Where an attachment was issued April 20, failure to make publication of the summons or other service of the same prior to May 21, is fatal to the continuance of the writ, requiring service to be made within thirty days after the warrant is granted. Union Distilling Co. *v.* Ruser (Sup.), 16 N. Y. S. 50, 61 Hun (N. Y.) 625.

In Wisconsin, under one section of the statute providing that if the defendant's property be attached, and personal service or substituted service upon him can not be had, service may be made by publication; and under another section providing that in order to enforce a lien, the plaintiff may attach the property upon which the lien is claimed as in personal actions, it was held that, where a contractor was getting out logs for a lumber company an attachment upon the logs for work done on them for the contractor, and for supplies furnished to him was sufficient to support service upon him by publication and gave the court jurisdiction to adjudge a lien upon the logs. Shearer *v.* Davis & Star Co., 78 Wis. 278, 47 N. W. Rep. 360.

1. Simmons *v.* Missouri Pac. Ry. Co., 19 Mo. App. 542.

2. *In Michigan* publication of notice within thirty days after the return day of the writ, as required by the statute, on a failure to make personal service, is a substitution of personal service and gives the court jurisdiction, but on failure to publish such notice within such time the court loses jurisdiction to proceed further. Millar *v.* Babcock, 29 Mich. 526. But after such substitution for personal service and proof of publication made, both parties, so far as relates to the question of appearance and pleading, stand in the same position as they would have occupied on the return of a summons personally served. Thompson *v.* Thomas, 11 Mich. 274. Further as to publication in Michigan, see Hubbardston Lumber Co. *v.* Covert, 35 Mich. 254; Cochrane *v.* Johnson, 95 Mich. 67, 54 N. W. Rep. 707.

In Kansas where the real estate of non-residents is sought to be attached on an order issuing at the time of filing the petition, an affidavit for service by publication must be filed, and the first publication made within sixty days from the date of the filing of the petition and other necessary papers. Therefore where the affidavit for constructive service and the first publication thereof was not made for more than thirteen months after the filing of the petition and the issue, levy and return of the order of attachment, the attachment fails because no *action* has

The time when the publication of notice must be made is so much a matter of local provision as not to demand treatment in a general work like this. It may, however, be said that the publication is not usually begun until after seizure is made of the property.[1]

§ 218. **As to the publication itself.**—The publication must be made within the time limited by the statute,[2] and both the notice and the publication thereof must comply strictly with the controlling statute, or the court will acquire no jurisdiction of the person of the defendant, and the judgment will be void.[3] When the statute requires an affidavit of the circumstances which renders the publication of notice necessary, the requirements must be strictly followed or the publication will not be justified and will be unavailing.[4] The notice must be pub-

been commenced. Jones *v.* Warnick, 49 Kan. 63, 30 Pac. Rep. 115. See also Claypoole *v.* Houston, 12 Kan. 324.

In Nebraska, lands conveyed to a non-resident in fraud of creditors may be subjected to the payment of the actual owner's debts when service is had by publication. Keene *v.* Sallenbach, 15 Neb. 200.

In Indiana the code permits publication in attachment proceedings to be made before the writ is levied. Sawyer *v.* Sawyer, 16 Ind. 213.

1. Baumgardner *v.* Bono Fertilizer Co., 58 Fed. Rep. 1.

But in Missouri the court can order the publication of notice to defendant before his property has been seized. Tufts *v.* Volkening, (Mo. Sup.) 27 S. W. Rep. 522, s. c. 51 Mo. App. 7.

2. Alton *v.* Lee, 6 Wis. 478; Majarietta *v.* Saenz, 58 How. (N. Y.) Pr. 505.

3. Haywood *v.* Collins, 60 Ill. 328; McLaughlin *v.* Wheeler, 1 S. D. 497, 50 N. W. Rep. 834.

4. *In New York*, where the ground for belief must be shown under one statute, it was necessary, to justify an order for publication of notice to a defendant, resident in the state, as absent or concealed, for the affidavit to state the circumstances of the defendant's absence, and the probable duration thereof, together with the names and residence of the persons from whom the information of such absence was derived. Evarts *v.* Becker, 8 Paige (N. Y.) 506.

In Illinois, in an affidavit for publication it will be sufficient if the plaintiff states upon oath that in consequence of information obtained he believes the place of defendant's residence to be that named therein. Malaer *v.* Damron, 31 Ill. App. 572. It is not necessary that it should state what counties the writs were issued to, or to give a description of the property attached. Morris *v.* Trustees, 15 Ill. 266. A statement of the date of the writ being unnecessary, a notice of publication will not be fatally defective if it recites a date to the writ subsequent to the return term. Forsyth *v.* Warren, 62 Ill. 68. In computing the time which shall intervene between the first publica-

lished for the full time required by the statute or order. Where notice is ordered to be published for a certain time, the passtion of the notice and the term of court, the rule is to exclude the day on which the notice is first inserted and include the day on which the term commences. Forsyth *v.* Warren, 62 Ill. 68.

In Indiana, the notice by publication need not show that the proceedings are in attachment; it will be sufficient if it avers the pendency of the action. Dronillard *v.* Whistler, 29 Ind. 552. And an error by inserting a wrong initial in the name of the plaintiff in the notice of the pendency of the action will not render the judgment and subsequent proceedings void. The proceedings, however, will be erroneous and will be liable to reversal in an appellate court, but they are good until thus questioned. Morgan *v.* Woods, 33 Ind. 23. And a proper notice duly published is not void by reason of its concluding with a notice to the defendant that unless he appear at court the matter will be heard and determined in his absence. Ziegenhager *v.* Strong, 1 Ind. 296.

In Iowa, a substantial compliance with the statute regarding the notice to an absent debtor of attachment proceedings against his goods, is sufficient. Bretney *v.* Jones, 1 Greene (Iowa) 366; Bardsley *v.* Hines, 33 Iowa 157.

In Kansas, the return of the officer must show that he attached the property of the defendant. Repine *v.* McPherson, 2 Kan. 340. And the affidavit for service by publication should expressly state that the property therein described has been attached and is sought to be subjected to the plaintiff's debt. Code Civil Proc., § 72. But where this may be inferred from what is stated, the affidavit is only voidable and must be amended, even after judgment, so as to embody such commencement of the action. Long *v.* Fife, 25 Pac. Rep. 594, 45 Kan. 271. The publication of notice must describe the land, or it will be defective. Cohen *v.* Trowbridge, 6 Kan. 385; Cackley *v.* Smith, 38 Kan. 450, 17 Pac. Rep. 156. As to the lack of necessity for the issuance of an ordinary summons after the publication of notice has been begun, see Bannister *v.* Carroll, 43 Kan. 64, 22 Pac. Rep. 1012.

In Mississippi, the notice required to be given to a non-resident debtor must be given by a publication in the newspaper. Moore *v.* Williams, 44 Miss. 61; Patrick *v.* Dillard, 44 Miss. 384. As to the manner in which the service by publication may be made, see Tupper *v.* Cassell, 45 Miss. 352. As to the time in which the publication shall be made in order to obtain a valid judgment, see Calhoun *v.* Ware, 34 Miss. 146. And as to the proper certificate of the same, see Wood *v.* Page, 55 Miss. 105. As to notice required by the act of June 17, 1852, and the publishing of the same in the state where the non-resident defendant resides, see Ridley *v.* Ridley, 24 Miss. 648, and Calhoun *v.* Ware, 34 Miss. 146.

In Missouri, the notice to an absent defendant by publication must state "that his property has been attached," or the judgment will be void. Drake *v.* Hale, 38 Mo. 346. However, a notice by publication that an action is commenced against him "by petition and attachment" is sufficient notice that his property has been attached. Moore *v.* Stanley, 51 Mo. 317. The notice shall state "the nature and

ing of a law altering the time of holding terms of court does not authorize the rendition of judgment against the defendant

amount of the plaintiff's demand." The statement that the proceedings are "founded on two promissory notes for the sum of $386.94" is not sufficient. Haywood *v.* Russell, 44 Mo. 252. But for contrary decisions under former statutes, see Sloan *v.* Forse, 11 Mo. 126; Davis *v.* Forse, 11 Mo. 130; Gates *v.* Clavadetscher, 19 Mo. 125. It is only where the affidavit for the attachment is based upon other grounds than those entitling plaintiff to an order of publication that an additional affidavit setting forth grounds for an order of publication becomes necessary. Bray *v.* Marshall, 75 Mo. 327. In this state the courts have power to award orders of publication on affidavit at the same term the suit is commenced. Freeman *v.* Rollins, 45 Mo. 315. And the clerk of the circuit court has power to make the order and publications in all cases where the court in term should have made them; and this power is not limited to the vacation which precedes the first session of the court after the petition was filed—Kane *v.* McCown, 55 Mo. 181—but it may be ordered by him in vacation after the lapse of two terms from the date of the process and without any new affidavit. Johnson *v.* Gage, 57 Mo. 160.

In South Dakota, under a statute providing for an attachment "in an action," and that an action shall be deemed commenced when the summons is issued, provided that personal service of such summons shall be made or publication thereof commenced within thirty days, the publication begun on the 31st day will, of course, be too late. McLaughlin *v.* Wheeler, 1 S. D. 497, 50 N. W. Rep. 834.

But in *New York* a delay after the issuance of an attachment of two years and seven months before publishing the notice, but where there had been immediate seizure of the debtor's property, did not divest the court of jurisdiction where the appointment of trustees in such proceeding precludes the debtor from making the objection. Matter of Clark, 3 Den. (N. Y.) 167. § 638 of the New York code, civil proc., however, provides that "personal service of the summons must be made upon the defendant against whose property the warrant (of attachment) is granted within thirty days after the granting thereof, or else before the expiration of the same time service of the summons by publication must be commenced, or service thereof must be made without the state; * * * and, if publication has been or is thereafter commenced, the service must be made complete by the continuance thereof." By force of this, a personal service made without the state, under an order for publication within thirty days after the attachment was granted, is sufficient to preserve the lien of the attachment. United Verde Copper Co. *v.* Tritle, 20 Abb.N.C.(N.Y.)57. And under this section when the summons in an attachment is ordered to be published in two daily papers and the New York Law Journal, although the publication in two is begun before the expiration of the thirty days and in the one not till after such time, the delay is fatal to the attachment. Union Distilling Co. *v.* Ruser, (Sup.) 16 N. Y. S. 51, 61 Hun (N. Y.) 625, 21 Civil Proc. Rep. (N. Y.) 293.

In *North Carolina* an affidavit is insufficient to justify a publication when it states that the defendant "is a non-

until after the lapse of time required.[1] Nor will the failure of a newspaper to make publication excuse the plaintiff from making due publication, though he be without fault.[2] Nor will a subsequent continuous publication give jurisdiction, where such publication is required to be begun within a certain time after the granting of the attachment which can not then be done.[3]

The giving of notice by publication, in conformity to the law in force at the time of the commencement of the suit, will not be affected by a subsequent statute changing the manner of giving notice.[4]

§ 219. Other acts than publication necessary — Mailing, posting and filing notices—Inventory.—Many statutes require something further to be done to complete a constructive service than the publication of the notice of the attachment, and whatever act or acts it requires must be strictly performed; for the omission of any preliminary step, necessary to the acquirement of jurisdiction, will render the whole proceedings void, even when collaterally attacked. If the statute require in an attachment against non-residents, in addition to the publication of notice, that the clerk shall send a copy of the notice by mail to the defendant, when his place of residence is stated in

resident of this state." It should also state that he "has property within the same." Spiers *v.* Halstead, 71 N. C. 209. As to the lack of necessity of an advertised or written notice in garnishment proceedings against an "absconding debtor" see Parker *v.* Gilreath, 7 Ired. (N. C.) 400.

In Tennessee, where the officer granting the attachment fails to make an order of publication, as provided by law, the court, or the clerk of the court, or the justice before whom the attachment is returned, may make such order at any time thereafter, and without such order, together with proper publication, the attachment will be void. Rogers *v.* Rush, 4 Coldw. (Tenn.) 272. Further, see Riley *v.* Nichols, 1 Heisk. (Tenn.) 16. As to the time see § 4264, M. & V.'s Code, 1884; Lowenstine *v.* Gillespie, 6 Lea (Tenn.) 641.

1. Saffaracus *v.* Bennett, 7 Miss. (6 How) 277.

2. Yerkes *v.* McFadden, 36 N. E. Rep. 7, 141 N. Y. 136.

3. Yerkes *v.* McFadden, 36 N. E. Rep. 7, 141 N. Y. 136.

The defendant will not be excused because of illiteracy from knowing the contents of a written notice and making a defense in due time. Sutton *v.* Gunn, 86 Ga. 652, 12 S. E. Rep. 979.

4. Parsons *v.* Paine, 26 Ark. 124.

the affidavit, judgment can not be rendered against a non-resident defendant, who has neither appeared nor been served with summons, unless notice has been sent to him by mail. Nor will the lack of such service by mailing be cured by a recital in the judgment that it is rendered upon "due proof of publication of notice," because the publication is distinct from the mailing.[1] All the acts prescribed are generally pre-requisite to the acquiring of jurisdiction.[2] In Alabama, however,

1. Dennison *v.* Taylor, 142 Ill. 45, 31 N. E. Rep. 148; Schwartz *v.* Cowell, 71 Cal. 306, 12 Pac. Rep. 252.

The affidavit of the clerk that he mailed notices addressed as follows "one copy to A. T. & F. W. Dennison," giving the address, will not be sufficient to give jurisdiction when the affidavit and declaration show that "A. T. Dennison and F. W. Dennison" are the plaintiffs without averring that they are copartners. Schwartz *v.* Cowell, 71 Cal. 306, 12 Pac. Rep. 252.

Kansas, deems the failure to leave a copy of the attachment with the occupant a mere irregularity when possession was taken of the property. Wilkins *v.* Tourtellott, 28 Kan. 825.

In Mississippi the failure of a creditor, in bringing an attachment against a non-resident, to file "with the proper officer his affidavit, if the affidavit for the attachment does not contain such notice, showing the post-office address of the defendant, or that he has made diligent inquiry to ascertain it without success," will render all subsequent proceedings in the cause void. Drysdale *v.* Biloxi Canning Factory, 67 Miss. 534, 7 So. Rep. 541.

2. Baldwin *v.* Ferguson, 35 Ill. App. 393. Wheaton *v.* Neville, 19 Cal. 41.

And the record must show these facts, to withstand collateral attack. Baldwin *v.* Ferguson, *supra*; Thornmeyer *v.* Sisson, 83 Ill. 188.

The statute requiring that the sheriff, after recording the attachment papers, shall serve them upon the occupant of the property, if there be one, otherwise to post them upon the property, posting instead of serving is proper if the officer can find no occupant when he goes to make the levy. Davis *v.* Baker, 72 Cal. 494, 14 Pac. Rep. 102.

When the statute provides that "if there be no occupant" the copy should be posted "in a conspicuous place" a return that the writ was served by posting a copy on the premises, without the statement in such return that they were occupied, is not sufficient and the proceedings thereunder will be void. Mickey *v.* Stratton, 5 Sawyer C. Ct. 475.

And when the statute requires that if the defendant have no residence within the precinct of the officer, then by mailing a copy to him and serving a like copy on the person, if any, in possession of the real estate, a return thereon that the writ had been served upon a non-resident by mailing a copy to him, without any allusion in such return to service upon any person in possession of the land, the court will get no jurisdiction. Richmond *v.* Brookings (Cir. Ct.), 48 Fed. Rep. 241.

As to personal service of a copy of the summons and complaint outside of the state not being equivalent to publication and deposit in the post-

under a statute requiring written notice of the levy, a sheriff's return stating "that the defendant had personal notice of the attachment," was deemed sufficient, on the presumption that sworn officers discharge their duties lawfully.[1]

Some statutes require that if the defendant can not be found in the county, then copies or notices shall be left with the person in possession of the property, if there is one, and if there is not, then by posting in a "conspicuous place." When there is such a requirement, the statute requires that the officer shall use due diligence to secure the best service, and may not adopt an inferior one until after reasonable diligence running through the time given for it and all superior modes are found impracticable.[2]

office when publication from the marine court of New York City is ordered, see Tyler *v.* Williams, 9 Daly (N. Y.) 451.

1. Fears *v.* Thompson, 82 Ala. 294, 2 So. Rep. 719.

But in Kansas it is said that it will be presumed that the officer did his duty when he attached the property, and therefore a service was deemed to have been properly made when the return of the officer showed that he attached certain real estate, and that when he attached the same he in fact took possession thereof and left a true copy of the order, but failed to state in so many words that he left a copy with the occupant, or, if there was no occupant, then in a conspicuous place on the real estate. Wilkins *v.* Tourtellott, 42 Kan. 176, 22 Pac. Rep. 11.

2. Town *v.* Tabor, 34 Mich. 262; Davis *v.* Baker, 72 Cal. 494, 14 Pac. Rep. 102.

The statute requiring that the officer should, when attaching real estate of a non-resident, leave a copy of the process with the person who "has charge or possession of the estate attached" was properly complied with in an attachment against the non-resident heir when such copy was left with the administrator, rather than the tenant in possession under him. Stone *v.* Hawkins, 56 Conn. 111, 14 Atl. Rep. 297.

If affidavits be filed to show that no person was in possession of the lands, the return may, however, be amended so as to show that fact necessary to the legality of other acts in such an event. Richmond *v.* Brookings, 48 Fed. Rep. 241.

In regard to a "conspicuous place" it is said that in attaching a lot having a small building upon it, posting the attachment papers upon the building complies with the requirement of the statute that they should be posted in a "conspicuous place" upon the property. Davis *v.* Baker, 72 Cal. 494, 14 Pac. Rep. 102.

And if posted on the side of a house next the street, the house being near a corner, and there being a vacant lot opposite the side of the house, yet if the notices can be easily and plainly seen by passers-by, it will be in a

Who is a proper person with whom the sheriff may leave a copy, is a question that is usually determined by the specific directions of the statute.[1]

"conspicuous place." Davis *v.* Baker, 88 Cal. 106, 25 Pac. Rep. 1108.

Posting a "notice" instead of a copy is insufficient. Sharp *v.* Baird, 43 Cal. 577.

The posting of notices "in three of the most public places within the precinct" as required, is satisfied by one of such notices being posted on the front door of the court-house and one on a side stairs leading to the justice's office, and one on a certain *corral* fence, when "these places were then regarded, and would now be, three about as public places as could be found in the precinct." Conway *v.* John, 14 Colo. 30, 23 Pac. Rep. 170.

As to the posting at the front door of the court-house in Mississippi, as well as publication, see McKey *v.* Cobb, 33 Miss. 533.

As to the posting at the front door of the court-house in Virginia, as well as publication, see Petty *v.* Frick Co., 68 Va. 501, 10 S. E. Rep. 886. As bearing upon the subject in Wisconsin, see Champion *v.* Argall, 25 Wis. 521.

1. *In Missouri*, the term "family," as used in the act regulating the service of process, is not confined to persons under the defendant's control or in his employ. A widowed mother who resides with her son is a member of his family within the meaning of the act. Ellington *v.* Moore, 17 Mo. 424.

In New Mexico, no publication is necessary if, in the absence of the defendant, a true copy of the original process be left with some person over fifteen years of age. Spiegelberg *v.* Sullivan, 1 N. M. 575; Bell *v.* Gaylord, (N. M.) 27 Pac. Rep. 494.

In Connecticut, the attested copies must not be delivered for service to the person in charge of the property attached, unless the non-resident defendant has no agent within the state. Cady *v.* Gay, 31 Conn. 395. A copy duly indorsed, and left at the wrong house by mistake, will be ineffective. Buckingham *v.* Osborne, 44 Conn. 133.

An agent of a foreign insurance company, sent out to solicit risks, is not such an "agent" as is contemplated in the Pennsylvania act regarding the service of process of attachment. The sheriff's return, to be conclusive, should set forth an agent's special character and place of business. Liblong *v.* Kansas Fire Ins. Co., 82 Pa. St. 413.

In Michigan, one section of the statutes provides that if the defendant can not be found within the county and he has no place of residence therein, the constable shall serve a copy of the attachment and inventory certified by him with any person having possession of the goods. Another section provides that if the attachment be returned personally served upon one of the defendants, the justice shall proceed as upon a summons personally served. Considering these provisions it was held that where the attachment was personally served on one defendant, the officer attaching the goods of both and not being able to find the co-defendant, who had no last place of residence in the county, leaving a copy of the attachment and inventory with the other defendant, in whose possession the goods were found, the service was good as to both. Buehler

When the controlling statute requires that when a levy is made upon real estate having no occupant the copy of the writ shall be posted in a conspicuous place thereon, a levy can not be made upon distinct tracts by posting such copy on one of them only.[1]

It is an exception to the rule for a statute to provide for the levy of an attachment upon land without providing for some act giving notoriety to the fact, or recording the same, except by a return of the writ to the proper court.[2]

Some statutes provide for the filing with the clerk of the notice of the attachment stating the names of the parties to the action, and the amount of the plaintiff's claim, and a description of the particular property levied upon, etc., to be recorded and indexed by the clerk in like manner as notices of the pendency of an action.[3] In New Hampshire it is the very essence of an attachment of real estate that a copy of the writ and return of the attachment should be left with the town clerk.[4] In

v. De Lemos, 84 Mich. 554, 48 N. W. Rep. 42.

1. Hall *v.* Stevenson, 19 Ore. 153, 23 Pac. Rep. 887.

But where a levy was made upon a number of town lots, the failure to place a copy on each separate lot did not render the service void in Kansas. Blake *v.* Rider, 36 Kan. 693, 14 Pac. Rep. 280.

After a subdivision into lots and blocks and the sale of some of them to third person, the levy on attachment by the description of the property as it was described by such subdivision will be a nullity and a sale thereunder will not convey title. Henry *v.* Mitchell, 32 Mo. 512.

2. For such exceptions see Lackey *v.* Seibert, 23 Mo. 85.

3. Hodgman *v.* Barker, 128 N. Y. 601, 14 N. Y. S. 574. See, also, Sykes *v.* Keating, 118 Mass. 517; Cheshire *v.* Briggs, 2 Metc. (Mass.) 486; Pomroy *v.* Stevens, 11 Metc. (Mass.) 244.

Under an Iowa statute providing that all attachments on land shall be certified by the deputy clerk, at places other than the county seats, forthwith to the clerk of the district court at the county seats, who shall enter them on his records as if originating there, a writ issued out of the district court held at a place other than the county seat, and was levied on real estate, it was held, that although the transcript of the levy was not filed within the time required, a purchaser without actual notice of the attachment, and before the filing of the transcript, acquired a good title, notwithstanding the effort of the creditor to attach. Benjamin *v.* Davis, 73 Iowa 715, 36 N. W. Rep. 717.

The entry of the levy, in the incumbrance book at the office of the clerk of the district court is not a compliance with the law requiring the *transcript* to be sent to the county seat. Benjamin *v.* Davis, 73 Iowa 715, 36 N. W. Rep. 717.

4. Kittredge *v.* Bellows, 7 N. H. 399.

Maine no lien is created by a levy on real estate as against subsequent purchasers, unless the officer making the levy files, within five days, in the office of the register of deeds, in the county or district in which some part of said real estate is situated, an attested copy of so much of his return on the writ as relates to the attachment, with the value of the defendant's property which he is thereby commanded to attach, stating the names of the parties, the date of the writ and the court to which it is returnable.[1]

A filing or registry in any other office than that prescribed by the statute is useless, and adds nothing to the force of the pretended attachment.[2] These examples will indicate to the practitioner and officer the necessity of a strict following of the provisions of the controlling statutes in supplementing or completing the actual levy on real estate. When the acts regarding the giving of notice are performed in the manner pointed out by law, it will be considered as actual notice to all persons.[3] Such acts, for the giving of notice, are intended to fulfill the same purpose as the taking of actual possession of personal property by the officer. It is notice to all the world of the levying of the attachment and a taking of possession of the defendant's property in the land by the officer.

The levy of an attachment upon real estate in the manner provided by law—as by filing a copy of the attachment with a description of the property attached in the county recorder's office—creates a valid lien, although no service is had upon the attachment-defendant until after the necessary issuing of an *alias* writ to obtain service thereof upon him.[4]

It is not, however, necessary that the officer himself should leave the copies. They may be sent by a servant of the officer. Pemigewassett Bank *v.* Burnham, 5 N. H. 275.

1. Carleton *v.* Ryerson, 59 Me. 438; Bacon *v.* Denning, 33 Me. 171; Nash *v.* Whitney, 39 Me. 341; Neally *v.* Judkins, 48 Me. 566; Saco *v.* Hopkinton, 29 Me. 268.

It is also specified that no lien is created on real estate unless the nature and amount of the plaintiff's demand is set forth in the proper counts or a specification thereof is annexed to the proper writ. Osgood *v.* Holyoke, 48 Me. 410.

2. Page *v.* Generes, 6 La. Ann. 549; Stockton *v.* Downey, 6 La. Ann. 581.

3. Davenport *v.* Lacon, 17 Conn. 278.

4. Raynolds *v.* Ray, 12 Colo. 108, 20 Pac. Rep. 4.

Any attachment of real estate which is invalid when made can not be rendered valid by any subsequent amendment of the writ.[1]

It is said that, although an objection to the failure to post the attachment and citation, as required by the attachment act, may be interposed by any person, yet, when the objection is raised by a person not a party to the proceeding, the burden of proving the omission, though involving a negative rests upon him.[2]

In some states no lien is created, unless the officer making the levy also makes an inventory and an appraisement of the land and then a return that it is attached.[3]

If there is a statutory provision relating to the service of a copy of an inventory upon the person in possession of the goods such act is necessary to the jurisdiction and must be strictly performed.[4] And the provision for such an act is none the less obligatory when it is prescribed as part of the act of personal service upon the defendant,[5] unless the defendant absconds from the county and state; this constitutes a waiver of service of copies of the writ, affidavit, undertaking and inventory.[6] And the service of a copy of an inventory will not be

1. Drew *v.* Alfred Bank, 55 Me. 450.

2. Mithoff *v.* Dewees, 9 La. Ann. 550.

3. Tomlinson *v.* Stiles, 28 N. J. L. 201.

The sheriff, in attaching real estate, must go to the owner or person in possession, and declare to him that he attaches the property; if there be no person in possession, he must make the declaration on the premises, and if there are several distinct lots lying in different places, he must proceed in this manner with respect to each lot, but where the several lots constitute one farm this is unnecessary. Tomlinson *v.* Stiles, 28 N. J. Law 201.

4. Swick *v.* Griffis (Pa. Com. Pl.) 12 Pa. Co. Ct. R. 389; Griffis *v.* Swick, (Pa. Com. Pl.) 2 Pa. Dist. R. 550.

A delay of four days after the service of the writ in furnishing an inventory of a stock of men's clothing is not unreasonable. Wilson *v.* Shapiro, (Pa.Com. Pl.) 12 Pa. Co. Ct. Rep. 466; Wilson *v.* Shapiro, 2 Pa. Dist. Rep. 367.

5. Langtry *v.* Wayne Circuit Judges, 68 Mich. 451, 36 N. W. Rep. 211.

In an attachment before a justice, personal service of the writ is insufficient, unless made after levy and accompanied by an inventory of the property seized, as provided by § 6840, How. St. Mich. Langtry *v.* Wayne Circuit Judges, 68 Mich. 451, 36 N. W. Rep. 211.

6. Thomas *v.* Richards, 69 Wis. 671, 35 N. W. Rep. 42.

sufficient, if a copy of the attachment is required also. The statute must be followed substantially.[1]

§ 220. **Publication and other required acts must appear upon the record to have been performed.**—Where there has been no personal service the record must show affirmatively that the defendant was duly notified of the proceedings against him, or that he appeared.[2] Proof of all the acts required by statute must show upon the record; they can not be made thereafter by parol.[3] When the statute requires a publication and mailing of notice thereof to the non-resident's abode, when known, the record must show that the clerk mailed to him a copy of the notice of publication.[4] The record must show both the publication and the mailing or it will not stand a collateral attack.[5] In Indiana proof must not only be made before judgment is rendered, that the defendant had notice by advertisement, but the record must either state that such evidence was given, or must itself contain the evidence.[6] But it has been

1. Stearns *v.* Taylor, 27 Mich. 88.

But the fact that the copy of the attachment served was not certified by the officer, is merely a formal defect, which does not render the service invalid, where it is, in fact, a true copy and where it is accompanied by a copy of the inventory of property attached, duly certified. Leonard *v.* Woodward, 34 Mich. 514.

On the contrary such a provision in the New York code has been said to be directory merely, and a failure to comply therewith, a mere irregularity, which would not of itself invalidate a levy. Adams *v.* Speelman, 10 N. Y. S. 364.

2. Crary *v.* Barber, 1 Colo. 72.

3. Haywood *v.* Collins, 60 Ill. 328; Haywood *v.* McCrary, 33 Ill. 459.

A certificate of publication, where there is no personal service, must appear to have been made by the printer or publisher of the newspaper in which notice was published, and the certificate should state the date of the last paper containing such notice. Haywood *v.* McCrary, 33 Ill. 459.

If the certificate of the printer or publisher be offered in proof of publication, it must conform to the requirement of the statute. It must appear that he was a printer or publisher. If there be no proper certificate, and the court does not find in its judgment that notice of some kind was given, the judgment in attachment will fail. Haywood *v.* Collins, 60 Ill. 328.

4. Thormeyer *v.* Sisson, 83 Ill. 188.

5. Baldwin *v.* Ferguson, 35 Ill. App. 393; Haywood *v.* Collins, 60 Ill. 328.

6. Foyles *v.* Kelso, 1 Blackf. (Ind.) 215.

The affidavit of the person who mailed a copy of the notice must show on what day of the month or year such copies were mailed. Briggs *v.* Finn, 10 Iowa 590.

held in Vermont, under a statute requiring the recording of a copy of the attachment whether the officer left a certified copy of the attachment with the town clerk, and directed him to record the substantial part, the attachment was valid as against one who had seen the copy filed, although the substance was not recorded, and though the copy varied from the original in an unimportant particular.[1]

Under a statute providing that when a copy of the writ has not been served personally on the defendant and he does not enter his appearance in the suit, the plaintiff may, on filing the affidavit of publication, etc., file the declaration and proceed to judgment as if personal service had been obtained, a delay of several days *after* filing the declaration before filing the affidavit rendered the judgment void.[2]

The order of publication is likewise, in Tennessee, required to be placed upon the minutes or rule docket of the court, as soon as the attachment is levied upon the property of the defendant and the attachment returned.[3]

§ 221. **The extent to which errors in the levy and personal service are waived by appearance.**—It is certain that defects and irregularities in the proceedings had to obtain jurisdiction of the person of the defendant are waived by a general appearance of the defendant thereafter; but it is not an equally well established principle that irregularities in the seizure of the property may be waived by a personal appearance.[4] It seems, however, that when the defendant appears, and tries the issues on the attachment generally, that he waives curable defects in the attachment process and levy; but it is certain that he does not waive jurisdictional defects therein. It is a fundamental principle that the court must obtain jurisdiction of the property,

1. Huntington *v.* Cobleigh, 5 Vt. 49.

2. Steere *v.* Vanderberg, 67 Mich. 530, 35 N. W. Rep. 110.

3. Rogers *v.* Rush, 4 Coldw.(Tenn.) 272.

4. The attachment rests upon its own facts and not upon the facts of the main action. Reed *v.* Maben, 21 Neb. 696, 33 N. W. Rep. 252.

In Connecticut, if the defendant appear in court and plead to the merits it will be a waiver of service upon himself personally, but will not invalidate the attachment. McGuire *v.* Church, 49 Conn. 248.

or the sale of it by order of the court may be successfully attacked collaterally.[1]

1. In *Nebraska* an acknowledgment of service is equivalent to actual service. Cheney *v.* Harding, 21 Neb. 65, 68.

In *Alabama* the appearance of the defendant waives any defect in the process of its service, and will render a judgment by *nil dicit* valid. Goldsmith *v.* Stetson, 39 Ala. 183. But if the process is void the plaintiff can not recover in the statutory claim suit. Neither will the consent or waiver on the part of the defendant remedy the defect. Jackson *v.* Bain, 74 Ala. 328. If the notice has not been served upon the defendant within the time required by the statute, a general appearance will waive such defect, and by filing pleas involving a recognition of the writ, and by going to trial without objection, the defendant thereby enters a general appearance. H. B. Claflin Co. *v.* Rodenberg, (Ala.) 10 So. Rep. 521. See further as to appearance and waiver, Hutchinson *v.* Powell, (Ala.) 9 So. Rep. 170. But a motion by the defendant to dissolve the attachment can not have the effect of a general appearance. Moore *v.* Dickerson, 44 Ala. 485.

And in *Ohio* the same principle obtains. The defendant, moving the court to dismiss the process, only comes in to save his property. His act, at most, can only be construed to be an admission of service. Jurisdiction can only be obtained in the mode authorized by the statute. Egan *v.* Lumsden, 2 Disney (Ohio) 168.

In *Arkansas* a general appearance by attorney will estop the defendant from attacking the judgment collaterally in the state, but if a judgment be sued on in another state, he may successfully defend by showing that the attorney who entered an appearance for him had no authority to do so. Eaton *v.* Pennywit, 25 Ark. 144.

But in *North Dakota*, where the summons is not served and the publication is not properly made within the time allotted, the provisional jurisdiction acquired by the levy is lost and the subsequent appearance of the defendant will not revive the attachment. Rhode Island Hospital Trust Co. *v.* Keeney, 1 N. D. 411, 48 N. W. Rep. 341.

In *New Jersey* one section of the statute provides that after a general appearance by defendant, the suit shall proceed as if commenced by summons, and no other claim shall be put in. Another section provides that, in case of such an appearance the lien of the attachment shall continue. In view of these provisions a general appearance waives all defects in the attachment. Connelly *v.* Lerche, 56 N. J. Sup. 95, 28 Atl. Rep. 430; Wenzel *v.* Lerche, 56 N. J. Sup. 95, 28 Atl. Rep. 430.

In *New York* an attachment is valid though there was no service on defendant, if he appears voluntarily. Pomeroy *v.* Ricketts, 27 Hun (N. Y.) 242. And the provision of the code that when the attachment is issued, "if publication has been or is thereafter commenced, the service must be made complete by the continuance thereof," does not prevent a waiver of the completion of service by a general appearance under a section which provides that such an appearance is the equivalent of personal service. Tuller *v.* Beck, (N. Y.) 15 N. E. Rep. 396, 46 Hun (N. Y.) 519. And an attachment begun by personal service

Where an action is commenced by attachment, and the defendant, though not personally served, appears by counsel and answers without controverting the plaintiff's claim, there is a

of summons, but on affidavits defectively verified, remains in full force, unless set aside on motion duly made. Carr *v.* Van Hoesen, 26 Hun (N. Y.) 316. But the defendant's appearing does not revive an attachment invalidated by a failure to serve the summons within thirty days. Blossom *v.* Estes, 22 Hun (N. Y.) 472.

In *Michigan*, the plaintiff having failed to file his declaration, as required, the defendant appeared in the case and had default entered against the plaintiff. The default was thereafter set aside under a stipulation that the defendant's appearance should not waive any irregularity or defect in the process or proceedings. It was held that the defendant was not precluded from making any objections to the proceedings which he could have made on a *special appearance* to complain of defects. Stearns *v.* Taylor, 27 Mich. 88.

In *Indiana* a general appearance by the defendant estops him from successfully assailing the service of process. Crabb *v.* Orth, 133 Ind. 11, 32 N. E. Rep. 711; Abbertson *v.* Williams, 23 Ind. 612; Elliott's Appellate Procedure, § 677 and cases cited.

In *Connecticut*, a defendant may waive a defect in the service of the writ, although a party claiming an interest in the attached property may be injuriously affected thereby. Hatstat *v.* Blakeslee, 41 Conn. 301.

In *Texas*, the court does not go to such an extent as in Connecticut, and only holds that if a writ of attachment is executed by an officer not authorized to execute it, and the attaching creditors, the debtors or the debtor's assignee for the benefit of creditors, all waive their objections to the irregularity, a subsequent judgment creditor can not complain. Walter *v.* Bickham, 122 U. S. 320.

In *Colorado* it was held that the objection that the levy of an attachment on mortgaged property was void as to the mortgagor because of defective service on him, was waived by the mortgagor by an appearance and motion to quash, and that the objection could not be raised by any one else. Elliott *v.* First Nat. Bank, 2 Colo. App. 164, 30 Pac. Rep. 53.

In *California*, the misnomer, consisting in the omission of part of the name of the defendant corporation in the affidavit and undertaking, will not invalidate a levy of an attachment on its property if it waives the irregularity by appearing without objection. Hammond *v.* Starr, 79 Cal. 556, 21 Pac. Rep. 971.

In *Missouri*, filing an answer to the merits is a waiver of the plea in abatement. Audenreid *v.* Hull, 45 Mo. App. 202.

In *Louisiana*, where the defendant appears and bonds the property attached, he thereby waives citation. Williams *v.* Gilkerson-Sloss Commission Co., 45 La. 1013, 13 So. Rep. 394. But the citation of an absentee in attachment can not be waived by a *curator ad hoc*. Ticknor *v.* Calhoun, 28 La. Ann. 258. See further, O'Hara *v.* Booth, 29 La. Ann. 817.

In *Wisconsin*, a writ void because of an insufficient affidavit was cured by a general appearance, answer to the merits, and going to trial, and probably would have been by any of these acts. Blackwood *v.* Jones, 27 Wis. 498.

general appearance and the plaintiff is entitled to a personal judgment, whether the attachment is sustained or not.[1] But if such a judgment be sued on in another state, the plaintiff may successfully defend by showing that counsel appeared without authority so to do.[2] But where a defendant appears specially, to move to quash the return on the summons, such act will not constitute a waiver of the objection to the service, because of the fact that it also prays judgment, whether it should be compelled to plead for the reason that it is a non-resident corporation.[3] Nor will the overruling of an objection that the court had no jurisdiction because of want of proper service, be waived by the defendant's appearance and participation in the trial.[4] Nor is it a waiver of process for a defendant to move

1. Bank of Commerce *v.* Payne, 86 Ky. 446, 8 S. W. Rep. 856.

2. Eaton *v.* Pennywit, 25 Ark. 144.

And where the defendant is personally served with summons, and appears to take issue upon the allegations of the affidavit without making any defense in the main action, the court will acquire complete jurisdiction. Roy *v.* Union Mercantile Co., 3 Wyo. 417, 26 Pac. Rep. 996.

Where in a suit against a firm consisting of two members, and one, a resident, is served with summons, while an order of publication should have been had against the other, a non-resident partner, as prescribed by the statute; yet where both partners appeared by attorney, and submitted motions or filed a plea, it was an appearance, and the court proceeded as if both parties had been served. Andrews *v.* Mundy, 36 W. Va. 22, 14 S. E. Rep. 414.

If property of a non-resident be attached, and service be had on him at his residence in the manner provided by the statute, the appearance by him and a plea of want of jurisdiction will give the court power to enter a personal judgment against him and order an execution to be levied on the property attached. Barnett *v.* Rayburn, (Tex.) 16 S. W. Rep. 537.

A traverse of the affidavit is a general appearance, and waives such defects as an omission in the sheriff's return on a second attachment of a statement that he had indorsed on the copies a notice to defendants that the property seized was the same seized, inventoried, and appraised in the other attachment, as required by statute. First Nat. Bank *v.* Greenwood, 79 Wis. 269, 48 N. W. Rep. 421.

3. N. K. Fairbank & Co. *v.* Cincinnati, N. O. & T. P. Ry. Co., (Cir. Ct. App.) 54 Fed. Rep. 420, 9 U. S. App. 212.

Nor where an attachment has not been personally served on the defendant, or a summons in lieu thereof, as required by the statute, will the defect be cured by the appearance of defendant and his attorney to object to the irregularity of the proceedings. Spettigue *v.* Hutton, (Pa. Com. Pl.) 9 Pa. Co. Ct. R. 156.

4. Lazzarone *v.* Oishei, (Super. Buff.) 21 N. Y. Supp. 267, 2 Misc. Rep. 200.

to dismiss the attachment for want of jurisdiction, on the ground that the action was brought in the wrong county.[1]

Where a plaintiff, by an action of replevin against an officer levying an attachment, prevents full service of the attachment by his writ of replevin and by procuring a traverse of the affidavit in attachment to be made, he is estopped to deny complete service of the attachment.[2] Where a defendant in attachment replevies the property attached as soon as the attachment is served, the only object of the sheriff's advertisement of the levy being to induce the appearance of the defendant, it need not be advertised; the appearance is effected by the replevin.[3] And it seems that the execution of a replevin bond, by the defendant in an attachment case, is a sufficient appearance to sustain a judgment by default, although the levy of the attachment be void, and there be no personal service of process.[4]

§ 222. **Amendment of the service of the writ.**—When the acts necessary to constitute a valid service of the writ have been actually performed, but some error has been made in the officer's indorsement of his doings, an amendment thereof is within the sound discretion of the court granting the writ,[5] but generally where the necessary acts have not been performed, and the time for service has expired so that they can not then be performed, an effort toward obtaining service of the writ is wholly void. The issuance and service of a new writ will then be the only practical resource. However, it has been held in one case, under a statute requiring that the affidavit should be annexed to the attachment at the time the same was served, or the service would be invalid, that the attachment should not be dismissed because of a service of the writ without having the affidavit so attached, but that an opportunity should be given to the party to procure a valid service.[6]

1. Belknap *v.* Charlton, 25 Ore. 41, 34 Pac. Rep. 758.
2. Herbst Importing Co. *v.* Burnham, 81 Wis. 408, 51 N. W. Rep. 262.
3. Reynolds *v.* Jordan, 19 Ga. 436.
4. Peebles *v.* Weir, 60 Ala. 413.
5. See *post* § 238, "Amendment of the Return."
6. Simpson *v.* Oldham, 2 Chand. (Wis.) 129.

Where the original attachment writ is absent from the files, and there is no showing that it is lost, affidavits to show that it was served will not be admitted.[1]

1. Stroner *v.* Prokop, 30 Ill. App. 56.

CHAPTER XI.

RETURN OF THE WRIT.

§ 223. Necessity of the return.
224. By whom the return must be made.
225. Where the return must be made.
226. The return becomes matter of record, and can not, in general, be contradicted.
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235. (g) Should be dated.
236. (h) Should be signed.
237. Presumptions favoring the return.
238. Amendment of the return. (a) Generally.
239. (b) When the amendment may be made.
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241. (d) What errors may be corrected by amendment.
242. (e) Effect of amendment of return.

§ 223. **Necessity of the return.** — Blackstone says that "whatever the sheriff does in pursuance of the command of the writ he must 'return'" or certify to the court together with the writ itself.[1] The word "return" is used to designate the certificate of the officer indorsed upon the writ stating what he has officially done and when and where, and to such return the court looks to see in what manner and to what extent its commands have been obeyed. Therefore it is of great im-

1. 3 Blackstone Com. 273.

portance that the return should be full and correct, and that it should show an adequate compliance with the requirements of the statute in the service of the writ. The return is an object of great importance in two different respects. First, as to its effect upon the attachment, for if it does not show a proper service of the writ the attachment may be invalid, but if the defect be in the return and not in the service, the same may generally be amended and the plaintiff's lien under the attachment will not be affected. And second, the officer is chargeable with the proper service of the writ and he must justify his doings thereunder by his return thereon.[1]

The levy is not complete until a statement of the manner in which it was made is indorsed upon the writ, and no steps can give validity to a levy not accompanied by such an indorsement.[2] If the return does not show a sufficient levy, the court will get no jurisdiction.[3] Proceedings in attachment must in all respects follow the statute authorizing them or no lien will be created.[4] And the return of the writ being required by the statute is necessary to create a lien upon the property seized.[5] And, furthermore, until the officer executing the attachment makes a return as to the defendant, the plaintiff can not properly proceed to judgment.[6]

When the officer has several attachments put into his hands he should return *all* the property as attached on *each* of them.[7]

When a bond of indemnity has been given to a sheriff to

1. See *post*, § 227, "Justification of Sheriff."

2. Sanger *v.* Trammel, 66 Tex. 361.

3. Robertson *v.* Hoge, 83 Va. 124.

But the manner of making the return itself — Rodgers *v.* Bonner, 55 Barb. (N. Y.) 9—and the indorsement, though insufficient, can not effect the validity of the levy, and may be amended. See *post*, § 238.

4. Fairbanks *v.* Bennett, 52 Mich. 61.

5. In the attachment of real estate, in many states, it is necessary to record a copy of the return in the recorder's office, as hereinbefore shown. See *ante*, § 219. And until it is lodged there, the real estate is not holden by the attachment. But it seems not to be necessary that the officer should personally carry the copy of his return to the office of register of deeds. Kendall *v.* Irving, 42 Me. 339. See, also, Fabre *v.* Bower, 2 Bay (S. C.) 124.

6. Morris *v.* Trustees of Schools, 15 Ill. 266.

7. Violette *v.* Tyler, 2 Cranch C. Ct. 200.

make a levy under an attachment, it must be returned with the papers in the attachment suit.[1]

When the statute requires the sheriff to return, with his writ a full inventory of the attached property, it is imperative that it be done; but if the statute also provide that "the court shall give the plaintiff a reasonable time to perfect" defective proceedings, an omission to attach an inventory being amendable, subsequent attaching creditors are not entitled to priority over the attachment in which the inventory has been omitted, and their only remedy is to compel an amendment of the return.[2]

The return does not become a matter of record until it is actually deposited in the office of the clerk of the court. Until the writ is returned into the actual possession of the clerk, the officer needs no permission of the court to make an amendment of his return indorsed thereon.[3] But after it is returned into the clerk's office, any act by the sheriff is unauthorized and of no effect to correct his previous errors or omissions.[4]

No return *as to the person* is necessary to give jurisdiction of the *property*, in a case where an affidavit of non-residence has been filed, and where a proper levy has been made.[5]

No return need be made on the writ when the action, begun by attachment, has been settled before the writ was executed.[6]

The making of a return is alone sufficient to constitute a second levy by an officer who has theretofore made an attachment of property and placed the same within the possession of a receiptor, provided he also gives notice to the bailee that he must hold the property to answer the second levy; but if the property never came into the receiptor's possession, or has

1. Butler *v.* Alcus, 51 Miss. 47.

And on a suit thereon, if the plea denies that it was returned with the papers, and the plaintiff in his replication avers that it was so returned, he holds the affirmative of the issue and must prove it. Butler *v.* Alcus, 51 Miss. 47.

2. Fleischner *v.* Pacific Postal Telegraph Cable Co., (Cir. Ct.) 55 Fed. Rep. 738.

3. Welsh *v.* Joy, 13 Pick. (Mass.) 477.

4. Wheaton *v.* Neville, 19 Cal. 41. Further as to "Amendment of Return," see *post*, § 238.

5. Johnson *v.* Gilkeson, 81 Mo. 55.

6. Atwell *v.* Wigderson, 80 Wis. 424, 50 N. W. Rep. 347.

been returned by him to the defendant, the second levy can not be made without an actual seizure of it.[1] In Wisconsin the statute requires that an officer, serving a second writ of attachment on the same property against the same defendant, must state in his return that he indorsed on the copies a notice to the defendants that the property seized was the same that was seized, inventoried and appraised on the other attachment; but though the officer fail to make such statement the attachment will nevertheless be valid against a creditor, who, after traverse by the defendants, levies an execution on the property.[2]

§ 224. **By whom the return must be made.**—The return on the writ must be made by the officer to whom the writ was directed, and if an attempt is made by any other officer to make a return, it is void.[3] And if a statute authorizes a constable to make a levy on attachment to a certain amount when the writ is addressed to the sheriff, the constable must deliver the process and the property to the sheriff of his county, and the sheriff must make a return of it as if he had himself levied it.[4] Under a statute providing that after a levy on land a constable shall hand the writ to the sheriff, who shall return it to the clerk, the failure of the sheriff to indorse on the writ the date of his return will not make the subsequent proceedings invalid if the constable's return was regular, and was entered on the sheriff's attachment docket.[5] And although a statute require that when any deputy sheriff serves any writ he shall indorse thereon the proper return of the proceedings, and subscribe his own name as well as that of the sheriff thereto, the failure to subscribe the sheriff's name to a summons will not deprive the court of jurisdiction.[6]

1. Bell *v.* Shafer, 58 Wis. 223.

2. First Nat. Bank *v.* Greenwood, 79 Wis. 269, 48 N. W. Rep. 421.

3. Olney *v.* Shepherd, 8 Blackf. (Ind.) 146.

4. McMeekin *v.* Johnson, 2 Dana (Ky.) 459.

But if the constable should sell the property, the court can acquire jurisdiction by an *alias* writ directed to the sheriff and served on the constable as garnishee. Barnett *v.* Ring, 55 Miss. 97.

5. Spengler *v.* O'Shea, 65 Miss. 75, 3 So. Rep. 378. See further as to the "Date," *post*, § 235.

6. Kelly *v.* Harrison, 69 Miss. 856, 12 So. Rep. 261.

§ 225. **Where the return must be made.**—The writ must be returned to the court from which it issued; and although it issue from a court of one county and is levied in another, the original writ must be returned to the court from which it issued.[1]

§ 226. **The return becomes matter of record, and can not, in general, be contradicted.**—The return becomes a matter of record and can not be contradicted by extrinsic evidence upon an allegation which merely avers its falsity.[2] It is a general rule that neither the parties to the writ, nor their privies, can falsify the record thereof, except in a direct proceeding to vacate or annul it, and that the return of the officer, as to all the facts which the officer has authority to certify, becomes a part of the record and can not be collaterally attacked by them, for the purpose of invalidating the sheriff's proceedings, or defeating any rights acquired under them. But it is not conclusive as to third persons whose interests are not connected with the suit, and whose interests may be affected by the proceedings of the sheriff; nor is it conclusive as to collateral facts or matters not necessary to be returned.[3] Proof of service is made by the

1. In Texas, however, the officer who makes the levy should return the claim-bond and a copy of the writ to the court of the county in which the latter was made, having the jurisdiction to adjudicate the claim. Still *v.* Focke, 66 Tex. 715, 2 S. W. Rep. 59.

2. King *v.* Bucks, 11 Ala. 217.

A plea in abatement merely denying the defendant's right to the property levied on is bad on demurrer. King *v.* Bucks, 11 Ala. 217. Denying the ownership of property attached is not good matter for a plea in abatement of the attachment suit. Sims *v.* Jacobson, 51 Ala. 186.

3. Brown *v.* Davis, 9 N. H. 76; Chapline *v.* Robertson, 44 Ark. 202; Hutton *v.* Campbell, 10 Lea (Tenn.) 170.

If an officer return that he left a copy of the attachment writ, etc., at the defendant's place of abode, it may be contradicted. Buckingham *v.* Osborne, 44 Conn. 133.

Where, in fact, personal property is for the first time seized and taken into custody of the officer under a writ of execution and he return that he has levied the same upon certain property subject to a former attachment, it will not preclude the execution-creditor from showing that, from an omission of the officer to take the property into his custody, no such attachment had in fact been made. Root *v.* Columbus, H. V. & T. R. Co., 45 Ohio 222, 12 N. E. Rep. 812.

A judgment in attachment can not, however, be avoided by the testimony of the person upon whom the writ

sheriff's return ; and service can not be proved as a matter *in pais*, nor aided by presumption,[1] unless the language in the return is so clear as to sufficiently disclose to the court that a proper attachment has been made.[2] The return of the officer must show what property has been attached. Parol evidence can not be admitted for that purpose, but if there has been a *mistake* in the return, the officer has a right to show the real facts on a proper proceeding for amendment.[3] And it seems that parol evidence may be admitted to explain an already sufficient return, in a matter on which it is not wholly silent. For where the return stated "six head of cattle branded with different brands," parol evidence was admitted to identify the cattle seized with those claimed.[4] And if it become necessary to determine the exact time at which the levy was made, and the hour is not stated in the return, it may be proved by other evidence.[5] The return is conclusive against the officer making it. He will not be allowed to contradict it or disprove it by parol evidence.[6]

Although the return of the sheriff, "no property of the de-

was served, as the person in possession, that he never had possession of the property attached because such testimony would be in *contradiction* to the return. Kramer *v.* Wellendorff, (Pa.) 10 Atl. Rep. 892.

1. Woolridge *v.* Monteuse, 27 La. Ann. 79.

2. See "Presumption Favoring the Return," *post*, § 237.

3. Sanford *v.* Pond, 37 Conn. 588; see "Amendment of Return," *post*, § 238.

But in an action on an attachment bond for wrongful attachment the plaintiff may show what property of his was seized and delivered to the attaching creditor and by whom it was converted, even though the sheriff's return be silent as to such property. Hensley *v.* Rose, 76 Ala. 373.

4. Silver Bow M. & M. Co. *v.* Lowry, 5 Montana, 618.

5. Garity *v.* Gigie, 130 Mass. 184.

Several writs were served, on the same day, on the same goods. All the returns except one stated the time of day the service was made. The court said that it was neither a legal construction nor a presumption that such writ was served at the same time any of the others were; but that parol evidence was admissible to show at what time in the day mentioned in the return the service was made. Brainard *v.* Bushnell, 11 Conn. 16.

6. French *v.* Stanley, 21 Me. 512; Haynes *v.* Small, 22 Me. 14; Clark *v.* Gray, 11 Ala. 98; Chadbourne *v.* Sumner, 16 N. H. 129; Brown *v.* Davis, 9 N. H. 76; Ryan Drug Co. *v.* Peacock, 40 Minn. 470; Planters' Bank *v.* Walker, 3 Smedes & M. (Miss.) 409; Harvey *v.* Foster, 64 Cal. 296. See Denton *v.* Livingston, 9 Johns. (N. Y.) 96.

fendant found in my county," if actually returned to the clerk, might bind the sheriff's successor, yet if the writ has not been returned to the clerk, such indorsement by the sheriff upon the writ will not preclude his successor to whom the writ is delivered from levying the attachment upon the property of the defendant, nor render his acts irregular.[1]

§ 227. Return evidence in suit by or against officer making it.—In any action in which the officer is a party (either plaintiff or defendant), his return must be taken as *prima facie* evidence. It is a universal rule that the return of a sworn officer, acting within the sphere of his official duty, is always competent evidence and will be presumed to be correct until its falsity is shown.[2] The sheriff's return is, however, evidence of only such acts as he may lawfully do, under and by virtue of the writ.[3]

1. Courtney *v.* Carr, 6 Iowa 238.

2. Bruce *v.* Holden, 21 Pick. (Mass.) 187; Hensley *v.* Rose, 76 Ala. 373; Palmer *v.* Thayer, 28 Conn. 237; Nichols *v.* Patten, 18 Me. 231; Waterhouse *v.* Smith, 22 Me. 337.

The return of the officer, which states that he has duly made to the register of deeds the certificate required by law, is only *prima facie* evidence of that fact stated in such certificate, and the return may be contradicted and controlled by the production of the certificate itself. Dutton *v.* Simmons, 65 Me. 583.

The certificate of appraisers of property attached, indorsed on the back of the writ, and adopted by the officer as part of his return, together with the return, is competent evidence of the disposition of the property. Kennedy *v.* Pick, 43 Me. 423.

In Maine, when an officer sets up an attachment of personal property in defense to an action of replevin brought against him for the property, the return will be sufficient evidence that the property had been in his possession, in the absence of proof to the contrary. Smith *v.* Smith, 24 Me. 555.

Where an officer has been ordered to attach property to a certain amount, a return that he has attached all the hay, grain, etc., in the defendant's barn, the writ and return will be *prima facie* evidence that the property attached was worth that amount. Barney *v.* Weeks, 4 Vt. 146.

In Maine, also, when the return fails to state the value of the goods attached, it will be presumed, in the absence of all other testimony, that the property was of the value commanded to be attached. Childs *v.* Ham, 23 Me. 74.

The return is evidence in the officer's favor even in an action of trespass *de bonis asportatis*, brought by him against a stranger to the suit in which the attachment was made. Angier *v.* Ash, 26 N. H. 99.

3. Charles City P. and M. Co. *v.* Jones, 71 Iowa 234.

When a sheriff undertakes to justify his doings under the writ, after the time appointed for its return, he must either aver that he has returned it, or show some legal excuse why he has not returned it.[1]

The return of the officer is in some cases not only *prima facie* evidence, but conclusive proof for or against him. In Minnesota a sheriff's return to a writ of attachment is conclusive on him and his legal representatives when sued by the attaching creditors.[2] In New Hampshire it is conclusive evidence of the attachment, as against the debtor and those claiming under him by a subsequent purchase with notice,[3] and as between the officer and a trespasser.[4] And where the return is sufficient to constitute a valid attachment of personal property, it is, in the absence of fraud, conclusive of the fact of the attachment.[5] And in Texas, in an action for wrongful attachment, it is conclusive evidence as to what property was attached.[6] In Vermont the return of an officer, that he has attached property precludes him from showing that there was no property there.[7] And in Massachusetts, the return describing the premises attached is conclusive evidence of such attachment.[8] And the written return of the officer, on a writ, is competent to prove the attachment of the property, though the writ may never have been returned to the court to which it was returnable.[9] In Pennsylvania a return stating that the writ had been served upon an agent of the defendant corporation, which neither set forth the agent's special character nor place of business, was not conclusive that such person was the "agent" intended by the statute, as one upon whom process of attachment may be served.[10]

But although the return may be considered as conclusive

1. Kirksey *v.* Duboise, 19 Ala. 43.
2. State *v.* Penner, 27 Minn. 269.
3. Morse *v.* Smith, 47 N. H. 474.
4. Brown *v.* Davis, 9 N. H. 76.
5. Lathrop *v.* Blake, 23 N. H. (3 Fost.) 46.
6. Schneider *v.* Ferguson, 77 Tex. 572, 14 S. W. Rep. 154.
7. Barney *v.* Weeks, 4 Vt. 146.
8. Sykes *v.* Keating, 118 Mass. 517. See further "Description of the Property," *post*, § 231.
9. Wilder *v.* Holden, 24 Pick. (Mass.) 8.
10. Liblong *v.* Kansas Fire Ins. Co., 82 Pa. St. 413.

proof against the officer making it, yet when a fact is therein stated, which from the nature of the case must be mere matter of opinion, parol evidence is admissible to explain it.[1] The return is not conclusive as to circumstances attending the service of a writ.[2]

Furthermore when the return states matters foreign to what has been done in the lawful execution of the writ, the return is not even admissible evidence of those matters; it is evidence only of what the law requires the officer to show.[3]

When two officers have made successive levies on the same chattel, the return of each is *prima facie* evidence of the levy made by him, and parol evidence is admissible to show which was the prior one. And when it is shown by other evidence that the officer making the first attachment was not in possession of the chattel at the time of the second attachment, the second one will prevail.[4]

§ 228. **When return should be made.**—After all other acts, necessary to complete a levy, have been performed, and an indorsement of the officer's doings has been made upon the writ, it should be returned to the court from which it issued. No precise rule can be stated regarding the time when this should be done. However, it should be made during the lifetime of the writ, for if it is made after the writ has expired it may be void, and if the date of the writ is later than the officer's return, such return is premature and in consequence thereof is void.[5] The officer may return the attachment at any time

1. Williams *v.* Cheesebrough, 4 Conn. 356.

2. Pomroy *v.* Parmlee, 9 Iowa 140.

3. Charles City P. and M. Co. *v.* Jones, 71 Iowa 234.

4. Bruce *v.* Holden, 21 Pick. (Mass.) 187.

5. Berry *v.* Spear, 13 Me. 187; Craig *v.* Williams, (Va.) 18 S. E. Rep. 899.

In Rhode Island, if it appears from the record that jurisdiction in an attachment suit has been lost by a failure to return the writ in time, an order of sale of the property is void, and will be no defense to an action for taking and converting the goods sold thereunder. Brown *v.* Carroll, 16 R. I. 604, 18 Atl. Rep. 283.

The contrary is held in Texas. Willis *v.* Mooring, 63 Tex. 340.

In Michigan, if the return be not made till the day following the return day, that fact alone will not destroy the lien created by the attachment. Horton *v.* Monroe, 98 Mich. 195, 57 N. W. Rep. 109.

during the sitting of the court on the return day, unless specially directed by the court to return it immediately.[1] But in some states if the return day has expired, no return can be legally made.[2] While in others a delay of many months will not forfeit the lien created by a proper levy, when the rights of other creditors have not intervened.[3] But where the creditor's attorneys have used due diligence to procure the return, the lien was not forfeited by *laches*.[4] It has been further said, that where all the formalities have been complied with, the attachment creates a lien, though it be not returned and filed until after the entry of judgment.[5] Again it is said, that where the levy has been made and the officer has omitted to make his return, the return may be made *nunc pro tunc*, and thereupon the rights of the attaching creditor will be the same as if it had been made at the proper time.[6] In North Carolina it is said that an attachment, like a warrant, need not contain any special day of return, and that it is sufficient if returnable within thirty days from its date.[7] And in Wisconsin and Indiana it need not be returned at any particular time; it

1. People *v.* Wheeler, 7 Paige (N. Y.) 433.

In Wisconsin a return was presumed to have been made on the return day, when neither the date of the return on the writ nor any entry of record showed that it was made at a different time. Slaughter *v.* Bevans, 1 Pinney (Wis.) 348.

2. Williams *v.* Babbitt, 14 Gray (Mass.) 141; Russ *v.* Butterfield, 6 Cush. (Mass.) 242.

3. City Nat. Bank *v.* Cupp, 59 Tex. 268.

4. Riordan *v.* Britton, 69 Tex. 198, 7 S. W. Rep. 50.

5. Cousins *v.* Alworth, 44 Minn. 505, 47 N. W. Rep. 169.

This was under a statute providing that where, in an action against a non-resident, his real property is attached, the attachment shall be a lien thereon from the time that a certified copy of the same, with a description of the real property seized, is delivered to the register of deeds for record. Cousins *v.* Alworth, 44 Minn. 505, 47 N. W. Rep. 169.

In an *ancillary* attachment, where the sheriff had omitted to make a return until after judgment was obtained, it was not permitted to affect the lien of the attachment-plaintiff who was not *privy* and did not consent to such omission of the sheriff, but more leniency is allowed in ancillary than in original attachments. Reed *v.* Perkins, 14 Ala. 231.

6. Bancroft *v.* Sinclair, 12 Rich. L. (S. C.) 617.

7. Hiatt *v.* Simpson, 13 Ired. (N. C.) L. 72.

may be retained till executed, or until by reasonable diligence it might be executed.[1]

It is not necessary to the validity of the attachment, that the officer should certify to his actions under the writ by making his indorsement upon it, previous to the return day.[2] But in Kentucky, at least, the *indorsement* of the levy on land after the return day thereof, as shown on the face of it, is void.[3]

When the goods levied upon are replevied from the officer, he has the right to retain the writ until such goods are returned to him, in order that he may then proceed with the execution of it.[4]

When the return refers to the month, without designating any year, it will be understood to intend the current year.[5] And if the day of the month and the day of the week, mentioned in the writ as the return day, do not correspond, the day of the

1. Chase *v.* Hill, 13 Wis. 222; Will *v.* Whitney, 15 Ind. 194.

2. Wilder *v.* Holden, 24 Pick. (Mass.) 8.

3. Peters *v.* Conway, 4 Bush (Ky.) 565. See "Amendment of the Return," *post*, § 238.

In Connecticut when a lien was preserved on real estate by recording the proceedings in the town clerk's office within four months, it was not necessary that it should be returned into the office of the clerk of the court within that period. If it was returned within a reasonable time afterwards, it was sufficient; and a return on the next day after the expiration of such period was within a reasonable time. Spencer *v.* Champion, 13 Conn. 11.

In Iowa the direction in a writ that it shall be returned by the first day of the next term, is surplusage, the writ will be valid although it is omitted. Westphal *v.* Sherwood, 69 Iowa 364.

In Illinois, where ten days do not intervene between commencing a suit and the first day of the next term of the court, the plaintiff has his election to have the process made returnable to the next following term, or to any succeeding term, to be holden within three months, and if it is made returnable to the first term, the cause will be continued. Mechanics' Sav. Inst. *v.* Givens, 82 Ill. 157.

In Florida a writ of attachment, issuing from a court of competent jurisdiction and returnable on the day of its issuance, or to the next term of the court instead of the next rule day, as required by statute, is not void. The officer to whom it is directed may execute it with due haste. Post *v.* Bird, 28 Fla. 1, 9 So. Rep. 888.

In Texas a direction for the return of a second writ of attachment *instanter*, is not ground for quashing it, for the statute provides that the writ shall be returned on or before the first day of the next term of the court. Panhandle Nat. Bank *v.* Still, 84 Tex. 339, 19 S. W. Rep. 479.

4. Levi *v.* Darling, 28 Ind. 497, Same principle in Louisiana, Matter of Hall, 21 La. Ann. 692.

5. Kelly *v.* Gilman, 29 N. H. 385.

month will control.[1] But where the officer's return was dated October 5, and the certified copy thereof, returned to the register of deeds, showed the date to be October 18, of the same year, no lien was created by the attachment.[2]

§ 229. **Formal parts of the return—(a) Must state what acts were done.**—The officer must, by the statement on his return, inform the court what his proceedings under the writ were, and how they were conducted. Then the court will be able to judge whether the writ has been "executed" and "served" as required by the statute.[3]

1. State Sav. Bank *v.* Hosmer, 95 Mich. 100, 54 N. W. Rep. 632.

2. Bessey *v.* Vose, 73 Me. 217.

3. Rankin *v.* Dulaney, 43 Miss. 197; Ezelle *v.* Simpson, 42 Miss. 515; Jefferies *v.* Harvie, 38 Miss. 97; Crizer *v.* Gorren, 41 Miss. 563; Haynes *v.* Small, 22 Me. 14.

In Mississippi, an indorsement by the officer that he had "executed, by serving the within attachment personally, on" the defendants "and levying on," etc., is not "full return of his proceedings thereon," as required by the statute. Rankin *v.* Dulaney, 43 Miss. 197, overruling Redus *v.* Wofford, 12 Miss. (4 Smedes & M.) 579.

In New Jersey, a return by the officer that he has served the writ according to law is not sufficient. It should state the way in which he executed it so that the court can judge that the service is according to law. Crisman *v.* Swisher, 28 N. J. L. 149.

In Louisiana, a statement that he has seized according to law, is not sufficient to show that he has attached according to law. He must state the manner in which the writ has been executed. Page *v.* Generes, 6 La. Ann. 549; Stockton *v.* Downey, 6 La. Ann. 581; Kilbourne *v.* Frellsen, 22 La. Ann. 207.

In Tennessee, under a statute requiring a return to state that the defendant is "not found in the county," it was held that the statute implied a diligent search, and that the defendant was not to be found by reason of absence or concealment, before a judicial attachment against his estate could be issued, and that a return stating "the defendant not found in my county" was not a compliance with such statute. Welch *v.* Robinson, 10 Humph. (Tenn.) 264.

In Texas, as to the return on an original citation before a judicial attachment can be sued out, see Walker *v.* Birdwell, 21 Tex. 92.

In Iowa, under a section of the code requiring the return to state the facts constituting the service of the writ, a statement that it was "duly served" is insufficient. Benjamin *v.* Shea, 83 Iowa 392, 49 N. W. Rep. 989.

In California, a return that the officer duly levied the writ is defective in not stating what acts were done by the officer in making the service, but such a return is *prima facie* sufficient to show an execution of it, though such presumption may be contradicted. Porter *v.* Pico, 55 Cal. 165.

However, under a statute requiring that the officer serving a writ of attachment shall return the same "with a certificate of his proceedings indorsed thereon or attached thereto," the officer's return asserted that he attached certain property, but it failed to set out the performance of all the necessary acts, and parol evidence was admitted to prove their performance; but no evidence was admitted which was not clear and positive.[1] On the other hand, it was held to be the duty of the sheriff, when returning an attachment of real property, to indorse thereon what acts he performed in serving the writ; and that it would be presumed that he stated all that he did toward making the service.[2] In another state it has been said that a sheriff's return must show an exact compliance with the law under which he makes the service.[3] And also, that the return need not set forth the fact of actual manual seizure of the goods attached, for the presumption is that the writ was lawfully issued.[4]

The general rule may therefore be said to be, that while the officer is required to make a full, true and minute return of his doings,[5] no such precision is required in the indorsement of the service of the writ as is required in a sheriff's return upon an execution.[6] Technical accuracy of the sheriff's return is not essential to the jurisdiction of the court over the land attached; nor is it essential to the validity of the levy and attachment proceedings.[7] If the return is certain on its face, and conforms substantially to the requirements of the statute, it is sufficient.[8] If the return shows a substantial service of it, although it does not show a compliance with all the particulars

1. Brusie *v.* Gates, 80 Cal. 462, 22 Pac. Rep. 284.

2. Sharp *v.* Baird, 43 Cal. 577.

3. Gilbough *v.* Keller, 11 Phila. (Pa.) 364.

4. Prather *v.* Chase, 3 Brews. (Pa.) 206. See as to "Presumption Favoring the Return," *post*, § 237.

5. Haynes *v.* Small, 22 Me. 14.

6. White *v.* O'Bannon, 86 Ky. 93.

7. Rowan *v.* Lamb, 4 Greene (Iowa) 468.

In this case it was presumed that the property attached was the property of the defendant. Rowan *v.* Lamb, 4 Greene (Iowa) 468.

8. Saunders *v.* Columbus Life Ins. Co., 43 Miss. 583.

The court will not intend facts inconsistent with the return tending to make it void. Strict compliance to the language of the statutes is not required. A substantial compliance is sufficient. Saunders *v.* Columbus Life Ins. Co., 43 Miss. 583.

mentioned in the statute as to the mode of service, it is sufficient.[1] But the statute requiring the filing of an "attested copy" of the writ, the return to be indorsed on the writ must show that such copy was in fact filed.[2] And the same is true in regard to the posting of notices and leaving of copies with occupants in case a levy has been made upon real estate.[3] And

1. Thompson *v.* Eastburn, 16 N. J. L. (1 Harr.) 100.

2. Carleton *v.* Ryerson, 59 Me. 438.

3. *In Michigan*, a return that the writ was not served must show that a copy has been left at defendant's last place of residence in the county, or that there was no such last place of residence. Adams *v.* Abram, 38 Mich. 302. And a return which shows only a service, on the date of the writ, upon the persons in whose possession the officer found the property, with the mere recital "the defendant not having any last place of residence within the county," being silent as to whether the defendant was or could not be found, and as to any attempt to find him, gives no jurisdiction to try the cause or to render judgment, if the defendant fails to appear. Nicolls *v.* Lawrence, 30 Mich. 395. Likewise, a return reciting that the officer has "personally attempted to serve it on the defendant by reading the same and offering a copy to him at the house of A, but he ran away. I could not deliver a copy to him," is not a return of personal service. Holden *v.* Ranney, 45 Mich. 399.

In Oregon, under a section of the code providing that "real property shall be attached by leaving with the occupant thereof, or, if there be no occupant, in a conspicuous place thereon, a copy of the writ," a return failing to show that the defendant was an occupant of the land and failing to show that the front door on which a writ was said to be posted was a conspicuous place, and failing to allege that the land had no occupant, is not sufficient. Hall *v.* Stevenson, 19 Ore. 153, 23 Pac. Rep. 887.

In New York, prior to the code, a return to an attachment stating merely that the levy had been made on certain enumerated goods was erroneous, because it should have further stated that a copy of the attachment had been left at the dwelling-house or other last place of the debtor's abode. Willard *v.* Sperry, 16 Johns. (N. Y.) 121.

In Vermont, a return stating that the officer left a copy of the writ at the last and usual place of abode of the defendant, without stating in what situation such copy was left, is a defective service and the suit may be abated, but the lien created by the levy is nevertheless valid as against subsequent creditors and trespassers. Newton *v.* Adams, 4 Vt. 437. But a statement that he advertised the sale to be in a certain place will be considered to mean that the advertisement was also *set up* at that place, and such return will therefore be sufficient. Collins *v.* Perkins, 31 Vt. 624.

In Missouri, a return on an order of publication, issued in an attachment proceeding, which does not show that the notice was posted at a place and for the time required by the statute, will not be sufficient to give the court jurisdiction. McCloon *v.* Beattie, 46 Mo. 391.

In Massachusetts a return showing

the return of an officer that he has made an attachment of property, is said to be equivalent to a return of all the facts, and acts done which are required to constitute a valid attachment of personal property; and that, in the absence of fraud, is sufficient and conclusive of the fact of the attachment.[1]

In cases of *ancillary attachment*, where no jurisdiction of the

an attachment of property and service of a summons on the defendant by leaving it "at his last and usual place of abode known to me as such in said Boston," is sufficient to support a judgment. Jones *v.* Walker, 15 Gray (Mass.) 353.

In Pennsylvania a statute requires the sheriff to attach houses and lands "by leaving a copy of the writ with the tenant or other person in actual possession holding under the defendant in attachment;" therefore a return of attachment issued under such statute against the real estate stating that the officer "had served the writ on T, garnishee, and as to the defendant *nihil*" was held to be insufficient to warrant a judgment for the plaintiff, because it did not show that T held under the defendant. Bryan *v.* Trout, 90 Pa. St. 492.

In Maryland a return to a writ of attachment issued on a judgment, that the officer had attached the undivided half in certain tracts of lands, specifying them by name, "but found no person in possession thereof, the same being wild and unimproved lands," was deemed to contain the usual clause of *scire facias* and the statements were according to the facts. Manton *v.* Hoyt, 43 Md. 254.

In New Hampshire if a return show that the officer did all that the statute required to make a good attachment of real estate, it need not state that the attachment was made by leaving a copy of the writ and return at the dwelling-house of the town clerk. Kelley *v.* Barker, 63 N. H. 70.

In Mississippi the return of an attachment of land occupied by the defendant as a residence, which recites that it was levied on the land and describes it by metes and bounds, stating that a true copy of the process was delivered to defendant, is not sufficient; because it is required that in such case the officer shall go to the house of defendant, and there declare that he attaches the land; and shall make a full return of his proceedings. People's Bank *v.* West, 67 Miss. 729, 7 So. Rep. 513.

In Maine the return must show that the debtor was duly notified to choose an appraiser. Means *v.* Osgood, 7 Greenl. (Me.) 146. And unless it shows by whom the appraisers were chosen, no title shall pass to the land at a sale under such attachment. Banister *v.* Higginson, 15 Me. 73.

1. Lathrop *v.* Blake, 23 N. H. (3 Fost.) 46.

In Mississippi the return of an attachment upon personal property which does not show what disposition has been made thereof is defective. Tucker *v.* Byars, 46 Miss. 549.

In Connecticut a return to an attachment of machinery in a building which shows that the officer took exclusive possession of it and placed a keeper over it, though it fails to state why the property was not removed from the building, is not defective. Morey *v.* Hoyt, 62 Conn. 542, 26 Atl. Rep. 127.

person is dependent upon the service of the attachment, the court will indulge presumptions in support of the attachment which are not admissible in favor of original attachment, for in original attachment cases the jurisdiction is dependent upon the levy.[1]

§ 230. (b) **Must state when the acts constituting the service were performed.**—The return must show the date of the service. The return of a levy of attachment on personalty is insufficient if it fails to show the date of the levy.[2] This must be done in order that it appear of record that the officer made the levy during the time he had authority so to do. For if it is made either before the writ issues or after it expires, no lien is created thereby, and the officer is liable as a trespasser.[3] It has, however, been presumed in New York, in a case where a levy and personal service had been made, that the personal service was made within the time required; the court stating that it might reasonably be presumed that the service was made on the day the property was attached.[4] A return of an officer, stating that he had made an attachment at twelve o'clock at noon, on a certain day, will be deemed to be prior to an attachment in which the return is stated to have been made on the same day, and does not state any particular time of the day.[5]

§ 231. (c) **Must contain description of the property attached and its location—Schedule or inventory.**—It is of great importance that the return of the officer upon the writ should

1. Stoddard *v.* McMahon, 35 Tex. 267, overruling Meuley *v.* Zeigler, 23 Tex. 88, and *contra* to Tiffany *v.* Glover, 3 G. Greene (Iowa) 387, in so far as they ignore this distinction.

The omission, until after judgment, to return an ancillary attachment, which was duly levied did not affect the lien of the attachment plaintiff, who was not privy to and did not consent to the delay of the sheriff. Reed *v.* Perkins, 14 Ala. 231.

2. Newton *v.* Strang, 48 Mo. App. 538.

3. See *ante*, § 205, "When the Officer to Make the Levy."

When the return showed a date six days prior to the date of the issuing of the writ, the levy was insufficient. Wilson *v.* Stricker, 66 Ga. 575.

4. Talcott *v.* Rosenberg, 8 Abb. (N. Y.) Pr. N. S. 287.

5. Fairfield *v.* Paine, 23 Me. 498.

describe the goods levied upon with such a degree of exactness and particularity that there may be no uncertainty in thereafter identifying them.[1] But a neglect in this regard will only subject the officer to nominal damages, unless it is shown that special damages have been occasioned thereby.[2] And where a levy itself has been properly made, an inaccuracy or mistake in this regard will not invalidate the attachment.[3] Where, however, the statute provides how the return shall be made, as it often does, in regard to the attachment of lands, no lien will be created upon the land unless the return complies with such provisions of the statute.[4]

An inventory of the property seized is required by some statutes as one of the steps necessary to a complete service and return of the writ, in which cases there can be no lien acquired without such an inventory; but in other states where it is not a *necessary* proceeding, yet if the property levied on consists of so many different articles that a memorandum of them can not be conveniently indorsed upon the writ, then the officer should make an inventory and file it with the process; and this inventory should so describe the articles that they may be identi-

1. Baxter *v.* Rice, 21 Pick. (Mass.) 197; Bruce *v.* Pettengill, 12 N. H. 341.

2. Bruce *v.* Pettengill, 12 N. H. 341.

3. Parker *v.* Williams, 77 Me. 418.

In this case the officer had attached 3,000,000 feet of logs and made a return of 600,000 feet, and it was held that the mistake did not invalidate the attachment. Parker *v.* Williams, 77 Me. 418.

4. Bessey *v.* Vose, 73 Me. 217; Milliken *v.* Bailey, 61 Me. 316; Robertson *v.* Hoge, 83 Va. 124.

Where a statute particularly provides that the attested copy of the process delivered to the lessee (where the lessor's property is attached in the hands of the lessee) shall have the return of the officer describing the property indorsed on it, a failure to comply with the statute in this regard is a material defect. Pond *v.* Baker, 55 Vt. 400.

And where a log lien statute provided that "if the defendant can not be found within the county, the officer shall leave a copy of the attachment and inventory at the last place of residence of the defendant," a sheriff's return on a writ of attachment that the property was "not of my knowledge in the possession of any one," such return gave the court no jurisdiction. White *v.* Prior, 88 Mich. 647, 50 N. W. Rep. 655.

Nor will a return showing that the officer "used due diligence in trying to get service on the defendant," authorize substituted service, as where "defendant can not be found." White *v.* Prior, 88 Mich. 647, 50 N. W. Rep. 655.

fied with reasonable certainty.[1] But where the return indorsed upon the writ gives a specific description of the property attached, a schedule reiterating the same facts is unnecessary.[2]

A description of the property attached should be given in the return, but no such precision is required in the indorsement of the levy of attachment as is required in the return upon an execution. A general description, if by it the property may be identified, is sufficient.[3] But it must be described with reasonable certainty.[4] For when it contains no description it is void for uncertainty and can not be explained by extrinsic evidence.[5] The description, to be sufficient, must be such as will not be misleading, but sufficient to identify the property.

1. Toulmin *v.* Lesesne, 2 Ala. 359; Desha *v.* Baker, 3 Ark. 509.

2. Pearce *v.* Baldridge, 7 Ark. 413; Dronillard *v.* Whistler, 29 Ind. 552.

When the statute requires an inventory, and no proper inventory and appraisement was made, no valid judgment in attachment or sale thereunder could be rendered or made. Tomlinson *v.* Stiles, 28 N. J. L. (4 Dutch.) 201; Willets *v.* Ridgway, 9 Ind. 367; McNamara *v.* Ellis, 14 Ind. 516; Leach *v.* Swann, 8 Blackf. (Ind.) 68; Will *v.* Whitney, 15 Ind. 194.

In New Jersey the attachment act did not prescribe the mode in which the sheriff shall return the writ, and therefore his certificate that he had duly served the process when it was accompanied by an inventory and appraisement shows a valid service. Boyd *v.* King, 36 N. J. L. 134.

The return of the officer stating, that, on a day named, he attached the goods and chattels mentioned in an inventory and appraisement annexed, when the writ is returned, accompanied with such an inventory and appraisement properly signed, is sufficient service in the absence of proof showing the omission of any essential statutory requirement in its execution. Dodge *v.* Butler, 42 N. J. L. 370.

When the entry of the levy refers to an invoice of goods thereto attached and no invoice appears at the trial to be attached, parol evidence is admissible to prove that the same invoice or list of goods was attached to this levy as to another levy made by the same officer on the same stock, and which is before the court. Wilson *v.* Stricker, 66 Ga. 575.

And where a return states that the appraisement containing a description of the property is returned herewith, but fails in itself to describe the property, it will, nevertheless, after judgment, be sufficiently certain. Grebe *v.* Jones, 15 Neb. 312.

3. White *v.* O'Bannon, 86 Ky. 93.

4. Bucklin *v.* Crampton, 20 Vt. 261.

5. Porter *v.* Byrne, 10 Ind. 146. As to the explanation of mistakes and inaccuracies by parol evidence, see *supra*, § 226, and "Amendment of the Return," *post*, § 238.

In Missouri, a return which fails to state on what property in a garnishee's hands the writ was levied, is insufficient to warrant a judgment against him by default. Maulsby *v.* Farr, 3 Mo. 438; Ridgway *v.* Farr, 3 Mo. 440.

But no such minute description is necessary, when the property is taken into the actual custody of the officer, as is necessary when it is left in the possession of a garnishee. A return mentioning merely "a stock of goods" is insufficient,[1] although "a lot of dry-goods * * * and an iron safe, situated in a store-house occupied by" the attachment-defendant, is said to describe the property with sufficient certainty.[2] Where the property seized is described as a stock of goods in a certain store, enumerating the articles composing the stock, and the intention was to attach the whole stock, the description is sufficient.[3] A return stating that a levy was made on "a certain stock of dry-goods, clothing, boots and shoes, hats and caps, trunks, valises, goods, wares, and merchandise in a certain store-house on lot 6, block 22, in town of Temple, valued at the sum of $1,000, found in possession of J. Shapera," is sufficiently certain.[4] A return reciting an attachment of "a stock of every kind" in a woolen factory, particularly described, and specifying the stock, as, a "lot of dye-wood and dye-stuff; lot of clean wool; sixteen pieces of black Oxford mixt casimere; 25 pieces doe-skin and tweed," etc., etc., "in said woolen factory" is sufficient.[5] A return reciting that the officer had "levied on the following slaves," naming them, was held to be a sufficient description.[6] A description reciting the seizure of the "neat cattle, horses, oxen," etc., on a certain described farm was sufficient, although it did not give the number of head, etc.[7] But, in the same state, a return reciting "all the hay and grain in the town of B" belonging to the

1. Messner *v.* Lewis, 20 Tex. 221.

2. Hilliard *v.* Wilson, 76 Tex. 180, 13 S. W. Rep. 25.

3. Mayer *v.* Brooks, 74 Ga. 526.

But a statement in the return and copy thereof, that the attachment was levied on "all stock and goods in said defendant's store, situated on Main street," is not a sufficient description of the property, under a statute which provides that the officer serving the process shall leave with the defendant an attested copy of the process and of his return thereon, describing any estate attached. Ahern *v.* Purnell, 62 Conn. 21, 25 Atl. Rep. 393.

4. Sweetser *v.* Sparks, 3 Tex. Civ. App. 33, 21 S. W. Rep. 724.

5. Ela *v.* Shepard, 32 N. H. 277.

6. Baldwin *v.* Conger, 17 Miss. (9 Smedes & M.) 516; Wharton *v.* Conger, 17 Miss. (9 Smedes & M.) 510.

7. Pond *v.* Baker, 55 Vt. 400.

defendant was not sufficient.[1] But where the only sheep on a defendant's farm were in a barn in charge of a tenant on the part of the farm which he had leased, a description in the return that they were on the defendant's farm was sufficient.[2] But a description was not sufficient, which recited that the property was situated "in defendant's cellar," when it was in the cellar of the house on the farm in which a tenant on shares lived, situated a mile from the house in which the defendant lived.[3] Where, however, a return set forth various articles in succession, continuing: "one wagon, one organ, 40 bobbin logs on defendant's farm," it was held that the words "on defendant's farm" referred to all the property and not to the logs only, although there was no comma after the word "logs."[4] A return that animals have been attached, which does not describe them or show that they were located on any farm or any other place, nor even in the jurisdiction where the service was made, is wholly ineffectual to create a lien.[5]

The location of the property attached, stated with such reasonable certainty as to make it susceptible of identification, is all that is required. An attachment against the Columbia National Bank, at Washington City, returned with the indorsement "attached credits in the hands of the Columbia National Bank," etc., was held to be sufficient without the addition of the words "of Washington City," and it was said they were immaterial.[6] The return must, however, show that the property was attached within the officer's county. If the attachment is on real estate the description will usually show the name of the county and state, but if it be personal property the county is apt to be omitted unless particular care is paid to the return in this re-

1. Rogers *v.* Fairfield, 36 Vt. 641.
Nor was a recital of the attachment of "all the coal in the town of B." Paul *v.* Burton, 32 Vt. 148.

2. Barron *v.* Smith, 63 Vt. 121, 21 Atl. Rep. 269.

3. Barron *v.* Smith, 63 Vt. 121, 21 Atl. Rep. 269.

4. Barron *v.* Smith, 63 Vt. 121, 21 Atl. Rep. 269.

5. Keniston *v.* Stevens, 66 Vt. 351, 29 Atl. Rep. 312.
What is a sufficient return of a seizure of cattle wherever found, see Davis *v.* Dallas Nat. Bank, — Tex. Civ. App. —, 26 S. W. Rep. 222.

6. Reynolds *v.* Smith, 7 Mackey (D. C.) 27.

gard. If, however, this be not shown by direct recital, and be shown indirectly, it will be sufficient. As where the officer recited that he had attached certain property, and then stated that the same was all he could find in his bailiwick, it was held sufficient to show that the writ was executed within the county.[1]

Land should be described in the return of an attachment with such certainty as would be sufficient in a deed of conveyance, otherwise the attachment will be void.[2] It has been said that the return will be defective if it fails to describe the land with such certainty that by its own terms the land may be identified without resorting to parol evidence;[3] the words "levied upon land," etc., being insufficient.[4] But it has also been said that if certainty can be shown from other facts, the defect may be thereby cured. Where an attachment was laid on a part of a certain tract, without designating the part, the defect being such as would, in itself, have invalidated the levy, it was rendered sufficient by proof that the defendant in attachment had previously conveyed all of the tract except the number of acres upon which the attachment was laid.[6] And an attachment of all of the defendant's interest "in a certain parcel of land on P street, Boston," was certain enough; parol evidence being admitted to show that the defendant was interested in only the one piece on that street. But it was said that if he was interested in more than one piece, parol evidence could not be admitted to show which was attached.[6] A return of attachment describing the property "as the property of the defendants, all right, title and interest that they may have to a grist mill standing in the town of ———," will be sufficient

1. Marnine *v.* Murphy, 8 Ind. 272.

In Michigan, where a constable's return to a justice's attachment was silent as to the place of seizure, it was presumed to have been as directed by the statute, "within the county." Bushey *v.* Raths, 45 Mich. 181.

2. Biggs *v.* Blue, 5 McLean, (U.S.) 148; Clark *v.* Ward, 12 Gratt. (Va.) 440; Henry *v.* Mitchell, 32 Mo. 512; Howard *v.* Daniels, 2 N. H. 137.

3. Meuley *v.* Zeigler, 23 Tex. 88.

4. Meuley *v.* Zeigler, 23 Tex. 88.

5. Biggs *v.* Blue, 5 McLean (U. S.) 148.

6. Whitaker *v.* Simner, 9 Pick. (Mass.) 308.

if it appears that the defendants had an interest in *one* grist mill in that town. But it is not sufficient if it appears that they also had an interest in some other grist mill in the same town.[1] A return of the officer that he has "attached all the right and interest of the debtor in any land in the town of E" is a valid attachment of any land coming within this description.[2] An indorsement of the officer that he had "attached the homestead farm of the debtor containing about thirty acres, more or less," was good, although the farm contained 150 acres.[3] And a return of the sheriff, that he had attached "as the property of the defendant" the land described in the writ, is sufficient under the laws of Minnesota.[4] But a return of the officer, that he has attached the goods, etc., of the defendant, and reciting "his life estate in all the lands got by his wife, supposed to be 450 acres," is too uncertain.[5] A description sufficient to distinguish and identify the land is all that is necessary; although the statute may contain specific directions, they need not, of necessity, be followed. But it is safe for the officer to follow such directions carefully and minutely.[6]

1. Lambard *v.* Pike, 33 Me. 141.

2. Taylor *v.* Mixter, 11 Pick. (Mass.) 341; Moore *v.* Kidder, 55 N. H. 488.

And it makes no difference that at the time of the attachment the defendant had conveyed away all his land in the town if the deed thereof has not been recorded. Moore *v.* Kidder, 55 N. H. 488.

And a general attachment of all the interest of the debtor in any real estate in the county will hold the land fraudulently conveyed by the debtor by a deed which has been duly recorded. Pratt *v.* Wheeler, 6 Gray (Mass.) 520.

3. Bacon *v.* Leonard, 4 Pick. (Mass.) 277.

4. Cousins *v.* Alworth, 47 N. W. Rep. 169, 44 Minn. 505.

5. Fitzhugh *v.* Hellen, 3 Har. & J. (Md.) 206.

6. Smith *v.* Low, 2 Ired. L (N. C.) 457.

Where, on its face, a writ of attachment embraced nothing but the defendant's interest, or his distributive share in the personal assets in an administrator's hands; and where the return showed no attachment of lands or interest therein, and it was admitted on the trial that the administrator was not in possession of the land, no lien was created on defendant's interest in the real estate of the decedent. Roth's Appeal, 94 Pa. St. 186.

Where a sheriff, intending to attach land in township 67, stated in his return that he had attached land in township 68, but entered on the incumbrance book an attachment of land in township 67, it was held that this entry was not constructive notice of an attachment in township 67. Collier *v.* French, 64 Iowa 577.

§ 232. (d) **Same, second attachment.**—The second writ of attachment can only be served by the officer who has levied the first. And as to the description to be given in the return on the second, it is said, in California, that when an officer has property in his possession, under one attachment, and he attaches it under a second writ, it will be sufficient, if he make return, that he has attached the right, title and interest of the defendant in the property, the same being in his possession.[1] And in Nebraska, different attachments of the same property may be made by the same officer, and he need make but one inventory and appraisement, and it may be returned with one writ only. Therefore an officer, in making an attachment, may levy it on a part of a stock of goods, and, if before making the inventory and appraisement other orders of attachment are placed in his hands for execution, he may levy upon property of sufficient value to satisfy all and make but one return of the inventory and appraisement.[2]

Property having been attached by one officer and taken into his custody is in custody of law, and, if another officer, who holds a writ of attachment against the owner of the property, make return that he has attached the same property, subject to the first attachment, still leaving the property in the possession of the first attaching officer, it will create no lien on the property.[3]

§ 233. (e) **Statement of the value of the property seized.**—Unless it is a particular requirement of the controlling statute it is no part of the officer's duty to fix a valuation upon the property he attaches.[4] And while his statement of the value of the property is *prima facie* evidence of a fair valuation, and the burden rests upon him to establish the contrary,[5] yet his return fixing a value to the goods levied upon will not be con-

1. O'Connor *v.* Blake, 29 Cal. 312.

2. Connelly *v.* Edgerton, 22 Neb. 82, 34 N. W. Rep. 76.

3. Burroughs *v.* Wright, 16 Vt. 619. As to levying upon property in *custodia legis*, see *ante*, § 46, and as to "successive levies," see *ante*, § 201.

4. Pierce *v.* Strickland, 2 Story 292; Friedenrich *v.* Moore, 24 Md. 295. As to "Appraisement and Inventory," see *ante*, § 231.

5. Pierce *v.* Strickland, *supra*; French *v.* Stanley, 21 Me. 512.

clusive against him, but will be taken as matter of opinion only, and may be explained by parol evidence.[1] Furthermore, when no value is fixed in the return, it will be presumed that the property levied on is equal to the amount for which the attachment is made, as expressed in the writ.[2]

§ 234. (f) **Should state that property attached is the property of the defendant.**—There is little harmony among the authorities regarding the statement in the return of the fact that the property attached is the property of the defendant, and yet there is no important conflict of decisions on this subject. Where the statute expressly requires it, the officer must comply, or his return will be fatally defective.[3] And where it is omitted, the plaintiff can not properly proceed to judgment.[4] For a judgment entered in such case will be void, especially in proceedings against a non-resident.[5]

Where the statute does not require, in the return, as a prerequisite of the court's obtaining jurisdiction of the property, a statement that the property seized is the property of the defendant, no such statement is absolutely necessary,[6] yet, as a

1. Denton *v.* Livingston, 9 Johns. (N. Y.) 96.

2. Childs *v.* Ham, 23 Me. 74; Barney *v.* Weeks, 4 Vt. 146.

Where an officer had been ordered to attach property to the amount of $20, and he returned that he had attached all the hay, grain, etc., in the defendant's barn, the writ and the return were taken as *prima facie* evidence that the property attached was worth $20. Childs *v.* Ham, 23 Me. 74; Barney *v.* Weeks, 4 Vt. 146. As to return being evidence in a suit by or against the officer making it, see *ante*, § 227, and as to the "contradiction of the return," see *ante*, § 226.

3. Offterdinger *v.* Ford, 86 Va. 917, 12 S. E. Rep. 1; Anderson *v.* Scott, 2 Mo. 15. See Willis *v.* Mooring, 63 Tex. 340.

4. Morris *v.* Trustees, 15 Ill. 266.

5. Repine *v.* McPherson, 2 Kan. 340.

An indorsement of the officer on the writ that he had levied the same on four horses (describing their color) "as the property of the defendant," is sufficient. Fleming *v.* Burge, 6 Ala. 373. But a statement that he levied on "an ox-cart," without saying to whom the ox-cart belonged, is insufficient. Clay *v.* Neilson, 5 Randolph (Va.) 596.

And a return stating that the officer levied the attachment "by seizing and levying upon all the right, title and interest of the defendant" in certain personal property is not sufficient, for it fails to show that defendant owned or had any attachable interest in the property, or that the property itself was actually seized. Newton *v.* Strang, 48 Mo. App. 538.

6. Willis *v.* Mooring, 63 Tex. 340.

matter of good practice, it should be included in the return.[1] Such a statement is not conclusive of the question of ownership, for that is still open to contest between the parties interested in its assertion or denial. The statement is only conclusive of the fact that the property was seized as the property of the defendant named in the writ.[2]

The same contrariety of opinion is found in cases of attachment on land, regarding the necessity of stating in the return that it is the property of the defendant. As in cases of attachment of chattels so in the attachment of realty, where under the provisions of the statute such a recital is a jurisdictional prerequisite, the omission of it will invalidate the lien.[3] It has been said in Mississippi that "in view of the great responsibility of the sheriff, every reasonable intendment ought to be indulged in favor of the regularity of his acts," and where in the attachment of land, he omitted to state that it was the property of the defendant, such fact is presumed.[4]

1. An indorsement by the sheriff that he has levied on certain property by virtue of the writ is, in Alabama, an affirmation that it is the property of the defendant. Thornton *v.* Winter, 9 Ala. 613. And in this state when a sheriff returns that he has levied on certain property, it will be intended that the property levied on was that of the attachment-defendant. Bickerstaff *v.* Patterson, 8 Porter (Ala.) 245.

In New York, also, a return stating that by virtue of an attachment against A B he had levied on certain property, the court construed the return as intending to be a return that he had levied on the property of the defendant, and held it to be sufficient. Johnson *v.* Moss, 20 Wend. (N. Y.) 145.

In Iowa, where it was adjudged that a mortgagee who had foreclosed his mortgage on certain goods and had purchased the goods, was not entitled to their possession, and other creditors of the mortgagor had levied upon the goods, while they were in the mortgagee's possession, it was held that attachments were good, although the return of the sheriff showed that the goods were attached as the property of the mortgagee. Buck Reiner Co. *v.* McCoy, 85 Iowa 577, 52 N. W. Rep. 514.

And further, the return of an attachment against three defendants that by virtue of the writ the officer had levied on certain slaves, and that the same were *replevied* by the bond of "the defendant" is sufficient to show that the slaves were the property of *all* the defendants. Kirksey *v.* Bates, 1 Ala. 303.

2. As to the "Contradiction of the Return," see *ante*, § 226.

3. Robertson *v.* Hoge, 83 Va. 124, 1 S. E. Rep. 667; Cousins *v.* Alworth, 44 Minn. 505, 47 N. W. Rep. 169.

4. Saunders *v.* Columbus Life Insurance Co., 43 Miss. 583.

And the same idea seems to be entertained in Alabama[1] and Iowa.[2] In Maine, a return stating that the land is "supposed" to belong to the debtor, is sufficient; the qualifying term "supposed" being held not to impair the effect of the attachment where the land is in fact the property of the debtor.[3] And a return in which but one of several defendants is named, is sufficient to hold the real estate of the defendant named, but not that of those not named.[4] And in Wisconsin, on a writ running against the land of A and B, late copartners, a levy of the officer on the land of A, and a return that he had seized the land as the property of B, was held to be a sufficient attachment of the interest of either, and no amendment thereof was necessary.[5]

§ 235. (g) **Should be dated.**—The return on a writ of attachment should be dated, but where the date of return as given is obscure, it will be considered in connection with the date of the writ.[6] And where it omits to state the year it will be understood to mean the current year when the writ is properly dated.[7] Where a justice, in his return to a writ of *certiorari*, to bring up for review the attachment proceedings before him, said that the officer's return of service of the attachment was not in fact made until the return day, it was held to be immaterial that the return of service was not dated, or that the justice has erroneously entered in his docket a minute that the writ was returned on a different day.[8] And further, in one

1. Where the sheriff's return showed an attachment of certain land in the possession of a person not a party to the suit it was presumed, in order to sustain the proceeding, that they were the lands of the defendant and levied upon as such. Lucas *v.* Goodwin, 6 Ala. 831.

2. Technical accuracy of the return is not essential to the jurisdiction of the court over land attached, nor is it essential to the validity of the levy. When the return is otherwise sufficient, although it omit to state that the land was the property of the defendant, such fact will be presumed. Rowan *v.* Lamb, 4 Greene (Iowa) 468, overruling Tiffany *v.* Glover, 3 G. Greene (Iowa) 387.

3. Banister *v.* Higginson, 15 Me. 73.

4. Lincoln *v.* Strickland, 51 Me. 321.

5. Robertson *v.* Kinkhead, 26 Wis. 560.

6. Millett *v.* Blake, 81 Me. 531, 18 Atl. Rep. 293.

7. Nash *v.* Mallory, 17 Mich. 232.

8. Nicolls *v.* Lawrence, 30 Mich. 395.

case where the attachment and summons had been returned and judgment had been rendered, and where nothing appeared on the writ to show when it was returned or filed, it was held, in the absence of proof to the contrary, that it was the legal intendment that the writ had been returned before the judgment was rendered.[1]

Where neither the date of the return of the writ or the entry of record shows specifically and positively that the return was made at a different time than the return day, it will be presumed to have been made on that day.[2]

§ 236. (h) **Should be signed.**—In Illinois, a return of a levy not signed by the proper officer is said to be no levy.[3] And in Virginia, under a statute that prescribed that any officer to whom any process has been directed shall subscribe his name to his return, and where the service is by deputy he shall subscribe to the return his own name as well as that of his principal, a return to a writ served by a deputy, containing only his name and not that of his principal also, was quashed.[4] But in Tennessee it is said that a levy, otherwise sufficient, is good, although the return be not signed by the officer; and that it *does* create a priority over the subsequent attaching creditors whose attachments are more formal.[5] In Kansas the omission of the officer to sign his return, is a defect that may be cured by amendment; and yet if it is not so cured, the record

1. Anderson *v.* Graff, 41 Md. 601.

2. Slaughter *v.* Bevans, 1 Pinney, (Wis.) 348; As to "Presumption Favoring the Return," see *post*, § 237.

3. Clymore *v.* Williams, 77 Ill. 618.

4. Mitchell *v.* Commonwealth (Va.) 17 S. E. Rep. 480.

But in New York such return may be signed by the deputy-sheriff and will be sufficient if the deputy-sheriff's name is signed by his clerk, the deputy having directed the clerk to sign it. Gibson *v.* Park Nat. Bank, 98 N. Y. 87.

5. Lea *v.* Maxwell, 1 Head (Tenn.) 365.

Where an officer making sundry levies inadvertently omitted, until after he had gone out of office, to sign his name to the returns, which were true and regular in all other respects, though the cause was still pending in court, it was held, that this did not deprive the creditor of his prior lien over subsequent attachments. Lea *v.* Maxwell, 1 Head (Tenn.) 365.

fails to show a valid attachment, and the defect is one that can be taken advantage of in a collateral proceeding.[1]

A return of attachment signed with the officer's name by his clerk is invalid and the attachment void in Connecticut, though delivered by the officer himself.[2] But, in New York, it is sufficient when signed with the deputy sheriff's name by his clerk, the deputy having directed the clerk to sign it.[3]

In New Jersey, an attachment issuing from a court for the trial of small causes must be executed in the presence of a freeholder, who must sign the appraisement.[4] When the law requires witnesses to the levy, the names of the persons in whose presence an attachment was served must be returned by the sheriff.[5]

§ 237. **Presumptions favoring the return.**—Attachment being a remedy that is not favored by the courts, it is a general rule that no presumption will be entertained in aid of it, but while the courts are far from uniform in presuming matters in aid of the officer's return, yet where the levy seems to have been otherwise sufficient they are more inclined to favor the return than any other step in attachment proceedings. They will generally give effect to the return made by the officer upon a writ of attachment, although informally made, provided the intention is sufficiently disclosed by the language used to be clearly discernible; but when the obscurity is so great that the purpose can not be ascertained, they will not make the return effectual by a construction which is merely conjectural.[6]

In many states it is presumed that the officer did his duty

1. Wilkins *v.* Tourtellott, 28 Kan. 825.

2. McGuire *v.* Church, 49 Conn. 248.

3. Gibson *v.* Park Nat. Bank, 98 N. Y. 87.

4. State *v.* Leon, 42 N. J. L. 540.

5. Cabeen *v.* Douglas, 1 Mo. 336. See, also, Morgan *v.* Johnson, 15 Tex. 568.

6. Hathaway *v.* Larrabee, 27 Me. 449.

A return on an attachment against three defendants reciting "I have attached all the right, title and interest the defendant has in and to any real estate in the county of Pennobscot" is too vague and uncertain to create a lien on the estate of either of the defendants. Hathaway *v.* Larrabee, 27 Me. 449.

in performing the acts necessary to constitute and preserve his attachment, when nothing appears to the contrary.[1] In New York, where levy and personal service had been made, it was presumed that the personal service was made within the time required, and the court stated further that it might reasonably be presumed that the service was made on the day the property was seized.[2] And in that state also the recital in a return that, by virtue of an attachment against A B, the officer had levied upon certain property, the court construed the indorsement as "intended" by the return that the officer had levied on the property of the defendant.[3] In Michigan, where the writ com-

1. In Maine, where an officer returned an attachment of personal property, and set up such attachment in defense, on the trial of an action of replevin against him for the same property, it was presumed that he did whatever was necessary to constitute and preserve his attachment; and, in the absence of any opposing proof, it was held to be sufficient evidence that the property had been in his possession. Smith *v.* Smith, 24 Me. 555.

In Kentucky a return showed that the attachment had been levied upon a town lot of the defendant, and that the officer had "posted a copy of the attachment on the premises, there being no tenant," the omission to state that the copy was left in a conspicuous place on the premises was cured by the presumption that the officer did his duty, when nothing appeared to the contrary. Lewis *v.* Quinker, 2 Metc. (Ky.) 284. And a return in these words, "Came hand September 11, 1870, at 10 o'clock A. M., and on the twelfth day of September, 1870, at 12 o'clock, I levied this attachment on about 140 acres of land, near Eminence, Henry county, the property of the defendants. The defendants not being found, and no person being found on the land, I posted a true copy of the within attachment on the door of the house of the land. A. H. Ditto, S. H. C." This was held to be sufficiently intelligible to create a lien of the attachment upon the land. White *v.* O'Bannon, 86 Ky. 93, 5 S. W. Rep. 346.

In Kansas a return showed that at a certain time the officer attached certain real estate, and posted a copy of the order in a conspicuous place on the premises; this being required by the statute, where there is no occupant. In the absence of any showing to the contrary, it was presumed that the officer did his duty, and that there was no occupant. Head *v.* Daniels, 38 Kan. 1, 15 Pac. Rep. 911. Under such a statute a levy upon a large number of town lots was not made void by failure of the officer to place a copy on each lot. Blake *v.* Rider, 36 Kan. 693.

When the month is mentioned in the return without designation of the year, it will be presumed to intend the current year. Kelly *v.* Gilman, 29 N. H. 385.

2. Talcott *v.* Rosenberg, 8 Abb. (N. Y.) Pr. N. S. 287.

3. Johnson *v.* Moss, 20 Wend. (N. Y.) 145.

manded him to seize the property of the defendant, and his return stated that he had seized the property described in the writ, it was presumed that the property belonged to the defendant.[1] In Mississippi, the word "levy" has been held to imply a seizure.[2] And in Maine, where an officer returned on a writ that he had attached certain goods, without fixing their value, the court presumed, in the absence of all other testimony, that they were of the value commanded in the writ.[3] In Michigan, where a return was silent as to the place of seizure, it was presumed to have been made as the statute directed "within the county."[4] And in Wisconsin the return itself will be presumed to have been made on the return day, unless the date of the return on the writ, or on entry on the record, shows specifically and positively that it was made at another time.[5]

The return will generally be considered sufficient when it complies substantially with the requirements of the statute, although it be not in the precise language of the statute under which the attachment issued.[6]

Greater presumptions will be indulged in support of ancillary attachment, where no jurisdiction depends, than will be admitted in favor of original attachments, where jurisdiction is dependent thereon.[7]

§ 238. **Amendment of the return—(a) Generally.**—The indorsement of the officer upon the writ does not become matter of record until it is filed with the clerk of the court to which it is returnable.[8] And until such time it would seem not to be

1. Horton *v.* Monroe, 98 Mich. 195; 57 N. W. Rep. 109.

The same intendment has been allowed in Alabama. Bickerstaff *v.* Patterson, 8 Porter (Ala.) 245. But see as to necessity of stating in the return that the property seized is the property of the defendant. *Supra*, § 234.

2. Baldwin *v.* Conger, 17 Miss. (9 Smedes & M.) 516.

3. Childs *v.* Ham, 23 Me. 74.

4. Bushey *v.* Raths, 45 Mich. 181; Horton *v.* Monroe, 98 Mich. 195, 57 N. W. Rep. 109.

5. Slaughter *v.* Bevans, 1 Pinney (Wis.) 348.

6. Saunders *v.* Columbus, etc., Ins. Co., 43 Miss. 583.

7. Stoddart *v.* McMahan, 35 Tex. 267, overruling Meuley *v.* Zeigler, 23 Tex. 88, and *contra* to Tiffany *v.* Glover, 3 G. Greene (Iowa) 387.

8. Welsh *v.* Joy, 13 Pick. (Mass.) 477; Courtney *v.* Carr, 6 Iowa 238.

technically correct to call the indorsement a "return." Until the writ is returned into the court, the officer has full power to make any corrections in his indorsement upon it.

After the officer has indorsed his doings upon the writ, and returned the same into the court to which it was made returnable, he has no right to alter it without leave of the court,[1] even before the return day of such writ.[2] And if the matter of amendment will affect the interests of any of the parties, such amendment can not be made without notice thereof to them.[3]

The amendment of a return is not a matter of right, and a motion for such amendment is addressed to the sound discretion of the court,[4] and is not regulated by court rules.[5] This discretion is, in the absence of special power conferred by statute, confined to the court from which the process issued. A superior court can not, on a trial before it, allow an amendment to a return made to an inferior court.[6] It may be stated as a general rule that the abuse or misuse of a process will be corrected by the court on motion.[7] And that mistakes and informalities in the return may be corrected at any time[8] by leave of the court, when such amendment will not affect the rights of third persons, and when it will be consistent with truth.[9] But it must be remembered that amendments are only allowed to the effect that the return may contain a true statement of what was done under the attachment, and not as an

1. Childs *v.* Ham, 23 Me. 74.

2. Myers *v.* Prosser, 40 Mich. 644.

3. Haynes *v.* Knowles, 36 Mich. 407. Two months after the return of the writ, and after defendants had appeared specially and moved to quash it, an order of the court *ex parte* authorized the sheriff to amend his return, so as to show that the defendants could not be found, but this he had previously done without leave of the court. It did not validate a notice published prior to such order so as to give the court jurisdiction. Cochrane *v.* Johnson, 95 Mich. 67, 54 N. W. Rep. 707.

4. Miller *v.* Shackleford, 4 Dana (Ky.) 264.

5. Planters' Bank *v.* Walker, 3 Smedes & M. (Miss.) 409.

6. Brainard *v.* Burton, 5 Vt. 97; Harper *v.* Miller, 4 Ired. L. (N. C.) 34. But in Massachusetts, the supreme court continued a case to give time for an application to be made to the inferior court for leave to amend the return. Thatcher *v.* Miller, 13 Mass. 270.

7. Pomroy *v.* Parmlee, 9 Iowa 140.

8. Porter *v.* Miller, 7 Tex. 468.

9. Brainard *v.* Burton, 5 Vt. 67; Pacific Postal Tel. Cable Co. *v.* Fleischner, 66 Fed. Rep. 899, 14 Cir. Ct. App. 166.

act in completion thereof.[1] By leave of the court the sheriff has the power to amend his return so as to conform to the facts; and when such an amendment is made it takes the place of the former imperfect return, and then can not be attacked collaterally for irregularity or error.[2] The discretion of the court below will not be interfered with.[3] An amendment to a return speaks from the date of the original imperfect return.[4] And if both returns when taken together will be sufficient, the attachment will be sustained.[5]

§ 239. (b) **When the amendment may be made.**—There is lack of uniformity in the decisions of the courts as to the time when an amendment to the officer's return on a writ of attachment may be allowed, but such an amendment has been allowed after demurrer,[6] and it would be very unusual for the court to refuse it at such time. An amendment has been allowed at a subsequent term, such amendment relating back to the proper return day.[7] But after the lapse of five terms of the court, when no further action had been taken or sufficient reason shown for the delay, the plaintiff was not permitted to have the process amended so as to make it returnable to the then ensuing term, that he might perfect service by the required publication.[8] But the corrections or mere mistakes and omis-

1. Downs *v.* Flanders, 150 Mass. 92, 22 N. E. Rep. 585. And as approaching to this averment of principal see Adams *v.* Robinson, 7 Pick. (Mass.) 461; Putnam *v.* Hall 3 Pick. (Mass.) 445; Hovey *v.* Wait, 17 Pick. (Mass.) 196; Maris *v.* Schermerhorn, 3 Whart. (Pa.) 13; Kidd *v.* Dougherty, 59 Mich. 240.

2. Buller *v.* Woods, 43 Mo. App. 494.

3. Thatcher *v.* Miller, 13 Mass. 270; Pierce *v.* Strickland, 2 Story (U. S. Dist.) 292.

4. Heaton *v.* Peterson 6 Ind. App. 1, 31 N. E. Rep. 1133.

One case in Maine holds that after the return has been recorded, an amendment will not relate back to the time of the registry, but will take effect only from the time of the amendment. Means *v.* Osgood, 7 Me. 146. But no court will permit an amendment to affect intervening rights of third persons. See *post*, § 240.

5. Layman *v.* Beam, 6 Wharton (Pa.) 181.

6. Moreland *v.* Ruffin, Minor (Ala.) 18.

7. Malone *v.* Samuel, 3 A. K. Marshall (Ky.) 350.

But in Mississippi it was not allowed without notice to the adverse party. Williams *v.* Oppelt, 9 Miss. (1 Smedes & M.) 559.

8. Branch *v.* Mechanics' Bank, 50 Ga. 413.

sions seem to be properly allowable after many years, where there is something on the record by which the correction can be made.[1] And it has been said that a writ *ad quod damnum* should be permitted by the court to be amended at any time before judgment.[2]

While an officer has been allowed to amend his return on a writ of attachment after his term of office has expired, and *without* notice to the opposite party,[3] yet it has not generally been allowed after the expiration of the officer's term without some preliminary process or notice to court to show cause in the matter.[4] One court said that "a liberal discretion is reposed in the court, upon due notice to the parties adversely interested, to permit returns on processes to be amended for the purpose of correcting mistakes, and the fact that the term of office of the sheriff has expired is no valid objection to the exercise of this power.[5]

1. Thatcher *v.* Miller, 13 Mass. 270; Emerson *v.* Upton, 9 Pick. (Mass.) 167.

2. Dawson *v.* Moons, 4 Munford, (Va.) 535.

And even several years after the sheriff's term of office has expired there being the inquest to amend by. Gay *v.* Caldwell, Hardin (Ky.) 63.

3. Morris *v.* Trustees, 15 Ill. 266.

4. Wilkie *v.* Hall, 15 Conn. 32.

5. Jeffries *v.* Rudloff, 73 Iowa 60; S. P. In Miles *v.* Davis, 19 Mo. 408; Keen *v.* Briggs, 46 Me. 467; Johnson *v.* Donnell, 15 Ill. 97.

A sheriff (or deputy) who has levied an attachment and sold the property to satisfy it may make a valid return thereof a long time after he has ceased to be an officer. Welsh *v.* Joy, 13 Pick. (Mass.) 477.

Where an officer has made a valid attachment and returned the writ without signing the return he may be permitted to sign it after going out of office. Lea *v.* Maxwell, 1 Head (Tenn.) 365.

An attachment was issued in January, and levied by the sheriff's deputy. The sheriff's term of office expired in January. In May of the following year, while an action against him for the property was shown by the return to have been taken under the attachment, the sheriff moved to amend the return. The supreme court said that neither the pendency of the action nor the fact that the sheriff's term of office had expired, could prevent the exercise of the trial court's discretion in allowing such amendment. Jeffries *v.* Rudloff, 73 Iowa 60, 34 N. W. Rep. 756.

An amendment was made to a return, so as to show by whom the appraisers were chosen, although nearly twenty years elapsed, no rights of third persons having intervened. Gilman *v.* Stetson, 16 Me. 124.

Other cases in which amendment was allowed after the officer's term has expired see Palmer *v.* Thayer, 28 Conn. 237; Gay *v.* Caldwell, Hardin (Ky.) 63.

While all states do not require it, yet reason seems to demand that in all cases where application is made for leave to amend the return, at least when some time has elapsed, that there should be something to amend by, for it is more than can be expected of a man, however strong his memory, to know with certainty the performance of a particular duty when he is daily and hourly performing similar duties for different persons. Where something does appear on the record by which the correction can be made it is properly allowable.[1] In such cases it has been allowed after judgment.[2]

An amendment may be allowed to the return although the attachment defendant may have made a voluntary assignment for the benefit of his creditors subsequent to the attachment.[3]

An officer may be permitted to amend his return so as to render it competent evidence in his own behalf, in an action against him for breach of duty in the service of the writ;[4] but he can not be forced to amend it so as to render it competent evidence against him, nor can he be forced to amend it for *any* purpose.[5]

§ 240. (c) **No amendment permitted that will affect intervening title or interest of a third person.**—No amendment of an officer's return will be permitted to have the effect of lessening or destroying the rights of third persons acquired in good

But in Mississippi an amendment to a return has been denied after the officer's term of office has expired. Cole *v.* Dugger, 41 Miss. 557.

1. Miller *v.* Thatcher, 13 Mass. 270; Emerson *v.* Upton, 9 Pick. (Mass.) 167.

Allowed pending a writ of entry brought by one claiming under the debtor. Pratt *v.* Wheeler, 6 Gray (Mass.) 520. And after a writ of error is sued out to reverse the judgment. Irvine *v.* Scobee, 5 Little (Ky.) 70.

The return of the levy upon a crop on a suit by a landlord against the tenant, may be amended after judgment, so as to show that the crop levied upon was grown on the rented land. Odom *v.* Shackleford, 44 Ala. 331.

An amendment may be made to the return of a summons, even at a hearing of a motion to reverse the judgment; and the amended return, when made, will relate back and take the place of the original. Capeheart *v.* Cunningham, 12 W. Va. 750.

2. Fairfield *v.* Paine, 23 Me. 498; Palmer *v.* Thayer, 28 Conn. 237.

3. Pond *v.* Campbell, 56 Vt. 674.

4. Smith *v.* Leavitts, 10 Ala. 92.

5. Maris *v.* Schermerhorn, 3 Whart. (Pa.) 13.

faith in the time intervening between the defective return and the amendment thereof, when there is sufficient appearing by the original return to give them notice that all the requirements of the law have probably been complied with, unless they have had notice by record or otherwise.[1] But if such third person have actual or constructive notice that the officer has done his duty in making the attachment, and that there was an omission, by mistake, in his return, which omission, if supplied, would perfect the officer's proceedings (or if that fact be clearly manifest on the record), his intervening interest will have no effect to prevent an amendment.[2] Where such third persons have not had such actual or constructive notice of the defect in the officer's return, an amendment of his return will operate, as to them, from the date of the amendment.[3]

1. Fairfield *v.* Paine, 23 Me. 498; Banister *v.* Higginson, 15 Me. 73; Berry *v.* Spear, 13 Me. 187; Davidson *v.* Cowan, 1 Devereux (N. C.) 304; Bowman *v.* Stark, 6 N. H. 459; Bessey *v.* Vose, 73 Me. 217; Emerson *v.* Upton, 9 Pick. (Mass.) 167.

Where, however, no third person's interests intervened, a return of an execution on land was permitted during the pendency of a suit in which the title to the land was brought in question. Eveleth *v.* Little, 16 Me. 374. And an amendment was allowed so as to show by whom the appraisers were chosen, after the lapse of nearly twenty years, when no rights of third persons intervened. Gilman *v.* Stetson, 16 Me. 124.

2. Where one attorney in behalf of two absent creditors sued out two attachments against the same debtor, one writ upon November 19, and the other upon December 20, the sheriff erroneously made return upon the latter as having been levied November 20, and the former as December 19, thereby apparently giving priority to the second writ. At the return term, the sheriff, by leave of court, amended the returns by changing the names of the months. It was held that the second attaching creditor had *constructive notice* through his attorney that the attachment of the other was first levied, and that therefore the amendment was properly made. Haven *v.* Snow, 14 Pick. (Mass.) 28.

And in like manner a sheriff having made a mistake in his return as to the year in which he executed the writ, and the entry of the judgment showing that he must have meant the previous year, his return was properly amended according to the facts. Third persons acquiring rights subsequent to the date as corrected, and prior to the date given on the original return, were affected, but could not complain because the record clearly showed the mistake and no one could possibly have been misled or injured by it. Johnson *v.* Day, 17 Pick. (Mass.) 106; Childs *v.* Barrows, 9 Metc. 413; Fairfield *v.* Paine, 23 Me. 498.

3. Ohio Life Ins. Co. *v.* Urbana Ins. Co., 13 Ohio 120. See also Means *v.* Osgood, 7 Me. 146.

§ 241. (d) **What errors may be corrected by amendment.** —Such amendments may generally be allowed as will have the effect of making the return a true statement of what *was done* under the attachment, and no amendment will be allowed which has the effect of being an act in *completion* of the attachment.[1] A return may be permitted to be amended so as to show when the attachment was in fact made.[2] And when only a memorandum of the time and service has been indorsed, the officer will be permitted to amend it so as to make a full return, and this even after he has ceased to be in office.[3] But if no minutes were made at the time of his attachment no amendment will be allowed after the lapse of years.[4] An ambiguous return may be amended so as to make it clear what acts were performed.[5] And mere mistakes may be amended at any time.[6]

The officer has been allowed to amend his return by inserting a statement that he posted a copy of the attachment in the manner required by law;[7] by changing the date of the year when the mistake is apparent from the date of the writ and the entry of the judgment;[8] by changing the name of the month when the mistake is made apparent by the record;[9] by inserting the word "county" instead of "inferior" in the clause "returnable to the inferior court," where jurisdiction had recently been taken from the inferior court;[10] by changing the stated value of the goods attached from $7.00 to $2,200, the actual value when the former statement was a pure mistake;[11] by inserting a statement that the property was attached "as the property of A and B;"[12] so as to show that the effects attached were

1. Downs *v.* Flanders, 150 Mass. 92, 22 N. E. Rep. 585.

2. Kidd *v.* Dougherty, 59 Mich. 240.

3. Adams *v.* Robinson, 1 Pick. (Mass.) 461.

4. Hovey *v.* Wait, 17 Pick. (Mass.) 196.

5. Maris *v.* Schermerhorn, 3 Whart. (Pa.) 13.

6. Ritter *v.* Scannell, 11 Cal. 238. See, *ante*, § 239, as to notice of the defect and the necessity of something appearing of record to amend by.

7. Wilson *v.* Ray, T. U. P. Charlt. (Ga.) 109.

8. Johnson *v.* Day, 17 Pick. (Mass.) 106.

9. Haven *v.* Snow, 14 Pick. (Mass.) 28.

10. Covington *v.* Cothrans, 35 Ga. 156.

11. Pierce *v.* Strickland, 2 Story (U. S. Dist.) 292.

12. Bank of Northwest *v.* Taylor, 16 Wis. 609.

the property of the defendant;[1] by specifying the particular articles attached;[2] by inserting a description of land which was omitted by mistake;[3] by affixing his signature *nunc pro tunc*, where the return is otherwise proper,[4] even though he has duly returned a subsequent attachment on the same land.[5] The officer may amend his return by correcting a misdescription of the realty attached, when the levy and notice is correct.[6] But he will not be permitted to change the description of the land so as to make the attachment apply to other lands of the debtor than those described in the first indorsement.[7]

§ 242. (e) **Effect of amendment of return.**—When the sheriff is permitted to amend his return to a writ of attachment, the amendment relates back to the time when the original return was made, and makes the return good *ab initio*,[8] unless intervening rights prevent such amendment from having any effect as to them.[9]

The effect of the amendment of mere formal defects, as shown above, when these defects are such as to be apparent, is to cure the error and make the return good from its date regardless of any rights which may have been acquired in the intervening time, whether such interest has been acquired by purchase or subsequent attachment.[10]

The effect of unusual additions to the return, it has been said, is to cause them to be considered as a badge of fraud.[11]

1. Mason *v.* Anderson, 3 T. B. Mon. (Ky.) 293.

2. Baxter *v.* Rice, 21 Pick. (Mass.) 197.

3. Vanderheyden *v.* Gary, 38 How. (N. Y.) Pr. 367.

4. Luttrell *v.* Martin, 112 N.C. 593, 17 S. E. Rep. 573; Dewar *v.* Spence, 2 Whart. (Pa.) 211; Lea *v.* Maxwell, 1 Head (Tenn.) 365.

5. Childs *v.* Barrows, 9 Metc. (Mass.) 413.

6. McClure *v.* Smith, 14 Colo. 297, 23 Pac. Rep. 786.

7. Williams *v.* Brackett, 8 Mass. 240.

8. Smith *v.* Leavitts, 10 Ala. 92; Heaton *v.* Peterson, 6 Ind. App. 1, 31 N. E. Rep. 1133; Malone *v.* Samuel, 3 A. K. Marshall, (Ky.) 350.

9. See "Intervening Rights of Third Persons," *ante*, § 240.

However, under peculiar circumstances it has been held in one case in Maine that the amendment did not relate back, but took effect only from the time of the amendment. Means *v.* Osgood, 7 Me. 146. And in one case in New Hampshire, that the amendment did not relate back but had the effect of an attachment from the date of the amendment. Cogswell *v.* Mason, 9 N. H. 48.

10. Haven *v.* Snow, 14 Pick. (Mass.) 28; Lea *v.* Maxwell, 1 Head (Tenn.) 365; Fairfield *v.* Paine, 23 Me. 498.

11. Pomroy *v.* Parmlee, 9 Iowa 140.

CHAPTER XII.

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Part I. Possession by Sheriff.

§ 243. Nature, purpose and effects stated generally.—Attached property is in custody of law and subject to the order of the court which issued the process. The immediate possession of chattel property is in the sheriff, who is no more than the servant of the court, and it is his duty to retain such possession until directed by the court to sell it on execution issuing after judgment is rendered on the merits;[1] or until the attachment lien is dissolved, and it thereby becomes his duty to return it to the defendant.

If the sheriff relinquishes his possession he becomes liable to the plaintiff, and if he does not take proper care of the property he becomes liable to the defendant as hereinafter shown.[2]

Furthermore, if the sheriff parts with such possession the lien acquired by the attachment will thereby be lost, and the sheriff, besides his liability to the plaintiff directly, becomes liable as for contempt of court.

§ 244. Possession must be actual, visible and notorious.—

1. Enos *v.* Brown, 1 D. Chipman (Vt.) 280.

2. See *post*, § 384, "Liability of the Officer."

The doctrine that an actual and visible change of possession must accompany every attachment and transfer of personal property was early adopted and has been strictly adhered to, and one court has tersely said that "from a rule of law so long settled and so well understood and relied upon in the community, we are not at liberty to depart."[1] Until personal property attached is taken into the custody of the officer serving the writ, no attachment can be said to exist, and although it need not be actual manual custody in all cases, yet it must in every case be such custody as the nature of the subject attached will admit.[2] The officer need not have touched every article which he attaches, for an inventory may be sufficient, but he must leave some one in charge if he does not actually carry the goods away with him.[3] He must maintain such custody and control of the property as will give unequivocal notice of the same,[4] or the attachment can not be sustained against subsequent attaching creditors, or purchasers without notice.[5]

§ 245. **Apparent exceptions to the rule.**—When there is no actual manual possession in any one else, an officer may claim possession of the property attached by him, even though he has not the actual possession in himself; provided, however, he has made a proper return.[6] And in the case of growing crops, constructive possession is all that is necessary for the sheriff to maintain control of attached property; and a bond is applicable and appropriate, as the crop reaches the state of ripening, to prevent a removal.[7]

§ 246. **Officer can not retain possession of tenement in which personal property is found.**—When personal property

1. Flanagan *v.* Wood, 33 Vt. 332.

When delivery can not be enforced and actual possession can not therefore be obtained, attachment is not the proper remedy. Harrison *v.* Mock, 10 Ala. 185. But garnishment may be available in such case. See Vol. II.

2. Root *v.* Railroad Co., 45 Ohio State 222.

3. Huntington *v.* Blaisdell, 2 N. H. 317. See *ante*, § 207, "How the Levy to be Made."

4. Sams *v.* Armstrong, 8 Mo. App. 573.

5. Bridge *v.* Wyman, 14 Mass. 190.

6. Hatch *v.* Fowler, 28 Mich. 206.

7. Grover *v.* Buck, 34 Mich. 519. As to "Bond," see *post*, § 286.

is attached, it is the officer's duty to remove the property from the possession of the debtor as soon as may be and take it into his own immediate possession; the permanent stationing of a keeper over the property is not warranted by law.[1] The officer can not remain in another's house, nor authorize any keeper to remain there to keep the goods attached therein, for a longer time than is reasonably necessary to enable him to remove the goods, unless he has the consent, express or implied, of the owner of the building. Such a retention of possession without consent renders the officer liable as a trespasser *ab initio*.[2] The occupation of the defendant's house for seven hours in the middle of the day, in Boston, by a keeper of the sheriff, without making any attempt to remove the goods attached, is unreasonable and renders the sheriff liable as a trespasser.[3]

§ 247. Character of the officer's possession.—The nature of the officer's possession will, of course, depend upon the nature and position of the property, but as a general rule the custody should be such as to enable the officer to retain and assert his power and control over the property so that it can not be withdrawn or taken by another without his knowing it.[4] The sheriff acquires a lien by virtue of the levy under attachment, and that constitutes a qualified and special title which subsists until all demands are paid for which the attachment was issued, and until judgment and sale of the property seized;[5] unless the attachment is sooner dissolved;[6] or unless the plaintiff fails in his action, or does not levy an execution thereon within the time prescribed, or by the satisfaction of the judgment before the sale of the goods.[7] The interest acquired by the sheriff by

1. Cutter *v.* Howe, 122 Mass. 541; Waterhouse *v.* Smith, 22 Me. 337.

2. Malcom *v.* Spoor, 12 Met. 279; Williams *v.* Powell, 101 Mass. 467; Rowley *v.* Rice, 11 Metc. (Mass.) 337.

3. Davis *v.* Stone, 120 Mass. 228.

4. Hemmenway *v.* Wheeler, 14 Pick. (Mass.) 408.

5. Rhoads *v.* Woods, 41 Barb. (N. Y.) 471; Collins *v.* Smith, 16 Vt. 9.

6. See *post*, § 326, "Dissolution of Attachment."

7. Ladd *v.* North, 2 Mass. 514; Parsons *v.* Phillips, 1 Root (Conn.) 481; Johnson *v.* Edson, 2 Aikens (Vt.) 299.

virtue of a levy is a special property,[1] founded upon his responsibility for the safe keeping of the chattels attached.[2]

The sheriff is the agent of both the plaintiff and the defendant in attachment—he holds possession for whom it may concern—and whichever acquires the ultimate right to the property may have his action against the officer for a neglect to perform his official duty.[3]

The sheriff, by his special property in the goods attached, has such an interest as will enable him to insure them, but he is not bound to do so. His deputy may insure them in the name of the sheriff, but he can not give a "premium note" in the sheriff's name.[4]

§ 248. **The acquiring of a special title by the officer does not change the ownership.**—The attachment does not change the ownership of the property attached.[5] The attaching officer has only the special interest in the property attached that is created by the attachment and measured by the amount necessary to pay the debt, for the collection of which the action was brought.[6]

§ 249. **Possession of property held by tenants in common, copartners, et al.**—As hereinbefore shown,[7] there is lack of uniformity in the holdings of the courts of the different states regarding the levy of an attachment upon property of the defendant, in which a stranger to the action holds a joint interest.

1. Norton *v.* People, 8 Cow. (N. Y.) 137.

2. Lathrop *v.* Blake, 23 N. H. 46.

3. Starr *v.* Taylor, 3 McLean (U. S.) 542; Blake *v.* Shaw, 7 Mass. 505; Stockton *v.* Hyde, 5 La. Ann. 300.

For particulars in regard to "Liability of Executive Officer," see *post*, § 384.

In Connecticut, the officer is said to be a bailee for the purposes of the law without any personal interest in the property or in the possession of it. Fowler *v.* Bishop, 31 Conn. 560.

4. White *v.* Madison, 26 How. Pr. (N. Y.) 481.

5. Fettyplace *v.* Dutch, 13 Pick. (Mass.) 388; Ludden *v.* Leavitt, 9 Mass. 104; Dillenbach *v.* Jerome, 7 Cowen (N. Y.) 294; Starr *v.* Moore, 3 McLean (U. S.) 354.

The defendant may sell the attached property subject either to the attachment or the execution, provided he can make actual delivery of the property without trespass. Starr *v.* Moore, 3 McLean (U. S.) 354.

6. Kerr *v.* Drew, 90 Mo. 147.

7. See *ante*, § 211.

But as a general rule it may be stated that while it is the officer's duty to seize and hold the defendant's undivided interest, yet he can not distrub the stranger in the possession of *his* undivided interest without becoming liable to him therefor. Members of a partnership can not be excluded from the possession of partnership property by an attachment of such property for the debt of one of the partners.[1] Although in Connecticut it is held that an officer may hold in his possession partnership property attached for the private debt of one of the partners, subject to judgment thereon.[2] And in Maine it is held that property in the hands of an officer in attachment for the debt of one partner can not be replevied by another.[3] Vermont solves this problem by holding that when a man conjoins his interest with another in the ownership of personal chattels his right of possession is necessarily subject to a paramount right of the law. The court saying that "it is impossible to hold that the interest of one joint owner of personal property can be taken and sold on his individual debt, consistently with our laws, without holding that the possession by the officer is *paramount to all others.*"[4]

§ 250. **Duration of sheriff's title and possession.**—Personal property attached on *mesne* process is considered in the custody of the law, in the keeping of the officer who served the writ of attachment, for the purpose of thereafter satisfying the execution which may be obtained in the suit, and he must retain it in his possession until the determination of the attachment suit in which it was seized; and if the plaintiff recover judgment, until the property is sold on execution issued thereon,[5] or until the expiration of the time prescribed by statute for the levy of an execution, or until the satisfaction of the judgment before sale of the goods; unless the judgment be otherwise

1. Morrison *v.* Blodgett, 8 N. H. 238.
2. Stevens *v.* Stevens, 39 Conn. 474.
3. Hacker *v.* Johnson, 66 Me. 21.
4. Whitney *v.* Ladd, 10 Vt. 165.
5. Rhoads *v.* Woods, 41 Barb. (N. Y.) 471; Enos *v.* Brown, 1 D. Chipman (Vt.) 280.

   By the very act of delivering the execution to the officer the property is charged or taken upon execution. Enos *v.* Brown, 1 D. Chipman (Vt.) 280.

satisfied,[1] or unless in case of perishable goods, he is judicially ordered to sell the same in pursuance of provisions of the statute.[2] The dissolution of the attachment will be, of course, a determination thereof, and it is the duty of the officer to retain the control of it so that he may return it if required.[3] He must retain it in his possession until he has notice that the suit is discontinued. He has no authority, while the suit is still pending, to deliver it to the plaintiff.[4] But he can, in some states, deliver it back to the debtor on a receipt;[5] and if he does this on the advice of the plaintiff's attorney, his personal responsibility ceases.[6]

The sheriff has no right to permit the property to go out of his possession except in due course of law, and he becomes responsible for it if he does. His return charges him with the property and he can not discharge himself.[7] The liability of the officer for the attached property which he has in his possession is not terminated, even though the informal writ on which the property was seized is afterwards made to assume legal form.[8]

§ 251. **Degree of care required from the sheriff.**—A sheriff is held responsible for the safe keeping of property to the extent of other bailees.[9] While the sheriff has been held to the exercise of more than ordinary care, the better rule seems to be that which requires him to exercise only ordinary care

1. Ladd *v.* North, 2 Mass. 514; Knap *v.* Sprague, 9 Mass. 258; Stackpole *v.* Hilton, 121 Mass. 449; Parsons *v.* Phillips, 1 Root (Conn.) 481; Johnson *v.* Edson, 2 Aik. (Vt.) 299; Collins *v.* Smith, 16 Vt. 9.

2. McKay *v.* Harrower, 27 Barb. (N. Y.) 463.

3. Farris *v.* The State, 33 Ark. 70.

4. Vanneter *v.* Crossman, 39 Mich. 610.

Plaintiff can not maintain replevin for it. Vanneter *v.* Crossman, 39 Mich. 610.

5. See *post*, § 264.

6. Farnham *v.* Gilman, 24 Me. 250.

7. Sanford *v.* Boring, 12 Cal. 539.

8. Childs *v.* Ham, 23 Me. 74. Further as to the "Liability of the Officer," see *post*, § 384.

9. Bridges *v.* Perry, 14 Vt. 262.

He is *prima facie* liable to produce the property upon execution, but he may, in Vermont, excuse himself by showing that it is not in his power and that he has been guilty of no fault. Bridges *v.* Perry, 14 Vt. 262; Ide *v.* Fassett, 45 Vt. 68.

in the preservation of such property.[1] He must exercise such care as a prudent man would take of his own property.[2] But if he leaves it in the possession of the defendant in the action, he becomes an insurer of it to the plaintiff, and nothing will excuse him for its loss but the act of God or the public enemy.[3]

§ 252. **Consequence of officer's neglect to take due care.**—If the officer should fail to take proper care of attached property he becomes liable to the creditor in the event of a successful termination of the suit,[4] and to the alleged debtor if the creditor should fail, but if the property has gone back to the hands of the debtor, the officer is relieved from any claim for it made by him.[5] And if he does not comply with all the legal requirements, or show some legal excuse, he not only becomes liable to those in whose behalf he holds and to the owner, but also to those claiming under the levy.[6] The officer who attaches is liable for neglect or misconduct in the keeping of the goods, and in the event of their loss or destruction, the person injured may recover to the extent of the injury sustained; which is the value of the property in case of loss.[7]

§ 253. **Officer may release his possession when.**—When an officer has taken goods into his possession by virtue of a writ of attachment, he may, at his discretion, release the same, if a third party claim that he is their owner; but the officer does this at his peril and the burden is upon him to establish the fact that the attached property did not belong to the attachment defendant.[8] The sheriff may release the attached prop-

1. Cresswell *v.* Burt, 61 Iowa 590; Dorman *v.* Kane, 5 Allen (Mass.) 38; Parrott *v.* Dearborn, 104 Mass. 104; Snell *v.* State, 2 Swan (Tenn.) 343.

2. Briggs *v.* Taylor, 28 Vt. 180; Ide *v.* Fassett, 45 Vt. 68; Moore *v.* Westervelt, 1 Bosw. (N. Y. Super. Ct.) 357.

3. Moore *v.* Westervelt, 1 Bosw. (N. Y. Super. Ct.) 357.

4. Smith *v.* Church, 27 Vt. 168.

5. Moulton *v.* Chapin, 28 Me. 505.

6. Jordan *v.* Gallup, 16 Conn. 536.

7. Jenner *v.* Joliffe, 8 Johns. (N. Y.) 381.

See further as to the "Liability of the Officer," *post*, § 384.

8. Wadsworth *v.* Walliker, 45 Iowa 395. See further as to "Interveners," *post*, § 384.

When the officer doubts that the property seized does belong to the attachment defendant, he may summon a jury to try the question of title. Rowe *v.* Bowen, 28 Ill. 116; Magne *v.* Seymour, 5 Wend. (N. Y.) 309. *Post*, § 430.

erty to the defendant upon the giving of certain bonds, as will be shown in the next succeeding article,[1] and he may surrender his possession to some responsible person in certain cases by taking the receipt of such person therefor in the manner hereinafter made to appear.[2] But the plaintiff is not, at common law, entitled to the possession of the property at any time, and by interfering with the officer's possession in any manner he renders himself liable as a trespasser.[3]

§ 254. **Possession when sheriff's term of office expires.**—The general rule is that the sheriff may, at the expiration of his term of office, retain the personal property held by him under a writ of attachment: that he need not turn it over to his successor in office. And the statute of California expressly provides that he is not to turn over property on which he has made a levy.[4] The removal of the sheriff from his office abates nothing of his power to retain possession of the property which he rightfully took upon the original writ of attachment. He must hold the same, during the time required by the statute after judgment for the levy of the execution, for the ultimate purpose for which he began the service.[5] After such time has expired without a demand therefor having been made upon him on the execution, he is no longer chargeable with the property.[6] However, it is, in Michigan, made the duty of the ex-sheriff, who has attached property in his custody, to expose such property to the sheriff when requested by him, in order that such goods may be taken in execution and sold to satisfy the same.[7]

§ 255. **Effect of intermixing goods with others of the same kind.**—Something has been heretofore said of the manner in which the levy should be made on chattels intermixed with those of a stranger and the effect of not separating them there-

1. See *post*, §§ 286 and 302.
2. See *post*, § 266.
3. Atkins *v.* Swope, 38 Ark. 523; Blanchard *v.* Brown, 42 Mich. 46.
As to plaintiff's provisional remedy under a code, see Skinner *v.* Stuart, 39 Barb. (N. Y.) 206.
4. Sagely *v.* Livermore, 45 Cal. 613.
5. Tuckey *v.* Smith, 18 Me. 125.
6. Lawrence *v.* Rice, 12 Metc. 527.
7. Fletcher *v.* Morrell, 78 Mich. 176.

from.[1] If one officer attaches goods and mixes them with other goods of the same kind theretofore attached by another officer on a writ against the same defendant, so that they can not be identified, he loses his lien and his attachment is defeated; and the first attaching officer may rightfully retain the whole.[2] Furthermore, if he leaves the goods which he seeks to attach, intermingled with other goods of the same debtor and claims the whole, so that another officer can not distinguish which goods have been attached, the latter officer may attach the whole.[3]

§ 256. **Abandonment—Relinquishment of possession.**—An attachment is regarded as abandoned and the lien will be dissolved if the officer does not, by himself or his agent, retain the property in his possession, or under his control with power of taking immediate possession, unless a special statute established a different rule.[4] Where the officer leaves attached chattels on premises of the debtor, for the use of the debtor and his family, the same as before the seizure, and does not separate them from the other goods of the debtor, he *prima facie* loses his property in them on the ground of presumed fraud or abandonment.[5] And leaving the property in the custody of the defendant's servant is an abandonment, because the servant's possession is the possession of the master.[6] In some states the attaching officer may, as hereinafter more fully shown,[7] take a receipt from the defendant for the redelivery of the goods on the demand or payment therefor, and leave them without removal; but he must, in order to preserve the attachment, retain the control of them himself or by his servant, or have the power of taking immediate possession.[8] If there be no special statute or local law governing the return of the goods

1. See *ante*, § 210.
2. Gordon *v.* Jenny, 16 Mass. 465.
3. Sawyer *v.* Merrill, 6 Pick. (Mass.) 478.
4. Nichols *v.* Patten, 18 Me. 231; Sanderson *v.* Edwards, 16 Pick. (Mass.) 144; Thompson *v.* Baker, 74 Me. 48.
5. Roberts *v.* Scales, 1 Ired. (N. C.) Law 88; Pomroy *v.* Kingsley, 1 Tyler (Vt.) 294.
6. Russell *v.* Major, 29 Mo. App. 167.
7. See *post*, § 264..
8. Weston *v.* Dorr, 25 Me. 176.

to the debtor, there is no constructive possession of the goods attached in the officer after he has left them in the possession of the debtor.[1]

When the possession and control of the property is relinquished by the officer there is a termination of the lien, and the general owner is remitted to his property unencumbered; because possession of personal property is the only *indictum* of ownership, and to allow the debtor to retain possession after service of attachment is *prima facie* proof that the attachment is fraudulent in respect to creditors.[2] And in the absence of a special statute no notice will preserve the lien against an attachment by another officer.[3] Even a redelivery of the property into the possession of the officer will not revive the lien, although the goods were so delivered expressly to be appropriated to the payment of the debt on which the action was brought.[4]

However, in regard to bulky or ponderous articles of personal property, there is usually some special statute or well-established local law whereby an officer may retain constructive possession of the same, after an attachment levy; on complying with the terms of such statute or law he retains the right to regain actual possession should it become necessary to remove the goods for safety.[5] But such return of possession to the debtor must be without collusion or fraud, and the officer remains as liable for their safety as though he had them in his actual possession.[6] With the exception, it seems, that where the property is returned to the keeping of the debtor, the officer is not responsible to him for an interference by third persons.[7]

§ 257. **What has been held to be an abandonment.**—Under a statute providing that "the officer serving the writ shall take and retain the custody and possession of the property attached,"

1. Pillsbury *v.* Small, 19 Me. 435.
2. Taintor *v.* Williams, 7 Conn. 271; Jones L. & M. Co. *v.* Faris, (S. Dak.) 60 N. W. Rep. 403.
3. Dunklee *v.* Fales, 5 N. H. 527; Bagley *v.* White, 4 Pick. (Mass.) 395.
4. Gower *v.* Stevens, 19 Me. 93.
5. Wentworth *v.* Sawyer, 76 Me. 434; Woodman *v.* Trafton, 7 Greenl. (Me.) 178; Higgins *v.* Drennan, 157 Mass. 384, 32 N. E. Rep. 354.
6. Hubbell *v.* Root, 2 Allen (Mass.) 185.
7. Patch *v.* Wessels, 46 Mich. 249.

the fact that the sheriff who levied an attachment on hay, grain and cattle on a farm, left all the stuff in the possession of a tenant of the attachment debtor, and the tenant then moved off, leaving the attached stuff on the place, was held to be an abandonment by the officer and the lien was thereby lost.[1] The abandonment by the absconding of the officer's keeper is an abandonment by the officer, and the attachment lien is thereby lost, where the keeper leaves no one in his place, even though he posted a notice of the attachment near the goods.[2] In a case where the keeper absented himself from the personal property every night without giving any intimation of his return, it was said to be an abandonment, and the taking of such property in replevin by a mortgagee was given priority.[3] But it is not necessary in order to maintain an attachment lien that the keeper should be at all times able to resist fraud and violence in retaining his actual possession.[4]

The unlawful sending of goods from out the state, with instructions to the person receiving them to sell at private sale, has been held to be an abandoment and destruction of the lien enabling the former owner or creditor to take control of them.[5]

§ 258. **What has been held not to be an abandonment.**— Where the officer, without parting with the actual control, surrenders the property in the immediate keeping of a receiptor or defendant in compliance with the local law or special statute in the manner hereinafter shown,[6] there is no abandonment or loss of lien. And in the absence of such local law or statute the officer may, without removing the property from the defendant's house, permit the defendant's family to have such temporary use of it as will not injure it.[7] The court in one case saying that "if such officer chooses to assume such risk

1. Hardin *v.* Sisson, 36 Ill. App. 383.

2. Carrington *v.* Smith, 8 Pick. 419; Sanderson *v.* Edwards, 16 Pick. 144.

3. Boynton *v.* Warren, 99 Mass. 172.

4. Harriman *v.* Gray, 108 Mass. 229. As will more fully appear subsequently, see *post*, § 269.

5. Dick *v.* Bailey, 2 La. Ann. 974.

6. See as to "Keepers," *post*, § 264, and as to "Forthcoming Bond," *post*, § 286.

7. Train *v.* Wellington, 12 Mass. 495; Young *v.* Walker, 12 N. H. 502.

we know of no rule of law to forbid it.'"[1] And an attachment is not dissolved if the officer's keeper of personal property allows the defendant out of humanity to use it.[2]

Attached property placed by an officer by permission upon the premises of a person, who refuses to assume any responsibility concerning it, is still in the possession and custody of the officer.[3]

Where an officer attached goods and left them in a building which he kept locked but occasionally visited without objection and thereafter delivered one of the keys to a third person who was not connected with the defendant in any way, there was no abandonment of the attachment.[4]

As an example of what is not an abandonment, although the sheriff's term of office may have ceased and he not have retained actual manual possession, the following instance is given: The plaintiff sued the sheriff to recover the value of certain counters and shelving owned by the attachment defendant, which property the sheriff had been especially directed to levy upon, alleging that the sheriff had negligently permitted the property to pass out of his possession and that he had thereby lost the means of collecting his judgment because the defendant was insolvent. The evidence showed that the sheriff had attached counters and shelving and that after his term of office had expired an order to sell them was delivered to his successor. The successor said he had not sold them because the door was locked and he supposed he had no right to break it open. It appeared at the time of the trial that they still remained in the store, which was unoccupied, and were in as good condition as ever and that no third parties were making any claim to them. The courts held that there was no abandonment of the attachment and that the counters and shelving could still be sold to satisfy the plaintiff's lien.[5]

1. Farrington *v.* Edgerley, 13 Allen (Mass.) 453.

The risk in most cases would be greater because of liability to a second attachment than from danger of depreciation in the value of the property. See *post*, § 260.

2. Baldwin *v.* Jackson, 12 Mass. 131.

3. Marshall *v.* Town, 28 Vt. 14.

4. Commonwealth *v.* Brigham, 123 Mass. 248.

5. Wolf *v.* Taylor, 68 Tex. 660 5 S. W. Rep. 855.

Where there has been an unlawful attachment and it becomes the duty of the officer to return the property to the defendant, a mere notice of a relinquishment of the attachment by the officer to the defendant does not constitute a return of the property, nor does it amount to an equivocal offer to return it.[1]

It is not an abandonment, for an officer, who has attached personal property and taken it from the possession of the defendant to a place of safe-keeping, to subsequently remove it; and his lien is not lost if in removing and while upon the highway it is taken from him on a second attachment.[2]

§ 259. When officer forced to part with possession there is no abandonment.—The sheriff is, as above shown, responsible for the safe keeping of property to the extent of other bailees. Where he has made an attachment of personal property he is *prima facie* liable to produce it upon execution, but it seems that he may excuse himself by showing that it is not within his power so to do and that he has been guilty of no negligence.[3] If he has taken all sufficient care of the property which he seized in attachment, and the same is stolen from him, he is not liable.[4] And where attached personal property is, without the officer's consent, taken out of the limits of his precinct, his attachment is not abandoned, nor is he exempted thereby from his liability to answer for it to the plaintiff.[5] Nor does the officer lose his hold of attached property, where an inspector of the revenue makes an unauthorized seizure of it and takes it into his possession. Even the declaration of the attaching officer, that he relinquishes his claim to the United States inspector, does not constitute an abandonment of it.[6] Nor will a second attachment of property in the of-

1. Becker *v.* Bailies, 44 Conn. 167.
2. Butterfield *v.* Clemence, 10 Cush. (Mass.) 269.
3. Bridges *v.* Perry, 14 Vt. 262; Kendall *v.* Morse, 43 N. H. 553.
4. Dorman *v.* Kane, 5 Allen (Mass.) 38. But see Lovell *v.* Sabin, 15 N. H. 29. See as to "Liability of Officer," *post*, § 384.
5. Lovejoy *v.* Hutchins, 23 Me. 272.
6. Beech *v.* Abbott, 6 Vt. 586. And see as to the property being in custody of the law, *ante*, § 56.

ficer's hands, made with force by another officer, destroy the lien of the first attachment.[1]

§ 260. **After an abandonment the property is liable to a second attachment.**—While an officer holds the property under an attachment, a second attachment can not be made by another officer, but must be made by the officer holding the property under the first attachment.[2] But where the first attaching officer, does not, by himself or another, retain possession of the property attached, a second attachment or *bona fide* sale will prevail.[3] And although the first officer may have given notice of his attachment, it will not invalidate the subsequent attachment.[4] It is the officer's duty to retain possession, and the mere knowledge of an attaching officer of the existence of a preceding attachment, will not prevent the levying of his attachment, when the previous attaching officer has relinquished his possession.[5] The correct rule in this regard seems to be, that when the second attaching officer finds property in the possession of the debtor, the mere knowledge on his part that the property has been attached will not prevent him from making a valid attachment of it, for if he finds the property in the possession of the defendant and knows only that it has once been attached, he may well presume that it is in his possession because the suit has been compromised and the attachment dissolved,[6] but if he knows that there is a subsisting attachment and an unrescinded contract of bailment, even though the debtor may, at the time, be in the possession of the property, he can not acquire a lien by attaching it.[7] In Maine such a valid existing bailment will prevent a second attachment, even though the second attaching officer does not know of the first attach-

1. Butterfield *v.* Clemence, 10 Cush. (Mass.) 269.

2. See *ante*, §§ 201, 207.

3. Pomeroy *v.* Kingsley, 1 Tyler (Vt.) 294; Bruce *v.* Holden, 21 Pick. (Mass.) 187; Adler *v.* Roth, 2 McCrary 445; Gower *v.* Stephens, 19 Me. 92; Odiorne *v.* Colley, 2 N. H. 66; Chadbourne *v.* Sumner, 16 N. H. 129.

4. Bagley *v.* White, 4 Pick. (Mass.) 395.

5. Chadbourne *v.* Sumner, 16 N. H. 129.

6. Dunklee *v.* Fales, 5 N. H. 527.

7. Young *v.* Walker, 12 N. H. 502.

ment.[1] Where, however, the officer finds the goods in a store where he can see them and take them, but he merely declares his intention to attach, locks the store and takes the key with him, leaving the goods in the store, they can not legally be attached by another officer, if these facts are known to him, or to the second attaching creditor.[2] Where the delay in removing property is not unreasonable, and can be accounted for by the state of the property, a second officer can not attach them; as, for example, the delay in removing growing crops, or an article in the course of being manufactured, or the like.[3]

When judgment has been rendered in favor of the plaintiff in attachment and the statutory time for levying an execution has transpired, without the goods having been taken on such execution, the attachment lien is lost and the goods may be seized by another officer; even by a deputy of the sheriff who made the first attachment.[4]

§ 261. **Action for interference with officer's possession.**— Since the attachment of personal property gives the attaching officer a special property in it and the right to its custody and possession, it follows as a logical sequence that the right of action for any injury done to it is in the officer;[5] for in any termination of the case he is accountable for the property either to

1. Brown *v.* Crockett, 22 Me. 537.

A writ of replevin will not, however, lie against a second attaching officer by the debtor. Such action should be brought by the officer. Brown *v.* Crockett, 22 Me. 537.

2. Denny *v.* Warren, 16 Mass. 420; Gordon *v.* Jenney, 16 Mass. 465; Newton *v.* Adams, 4 Vt. 437.

3. Roberts *v.* Scales 1 Ired. (N. C.) 88.

4. Warren *v.* Leland, 9 Mass. 265.

5. It will be readily apparent that an action will lie against any one except the true owner when such owner is not the defendant in attachment, for in such case the officer having made a wrongful attachment, has acquired no right of possession. Carroll *v.* Frank, 28 Mo. App. 69.

In a state where the traffic in liquors is prohibited by the statute and where in such state an officer holding liquors on attachment acquires no special property or right of possession in them, he can maintain no action for his possession, even though the party taking them has no right or authority so to do. Nichols *v.* Valentine, 36 Me. 322. As to levying attachments on spirituous liquors, see *ante*.

the creditor or the debtor. His right over the property attached is independent of both the creditor and the debtor. In a given event he is responsible to the debtor, and in another event he is responsible to the creditor; hence his right of action exists so long as the special property continues in him and no longer.[1] He can maintain an action for any interference with it so long as he continues, either liable to the attaching creditor for its application to the satisfaction of the forthcoming execution; or to the owner for its return upon the dissolution of the attachment, but no longer.[2] If he is accountable to neither he can not recover in his action. And this may happen through operation of law.[3] The officer may have an action, even against the original owner, if the latter remove and convert the attached property.[4] And no irregularity, nor informality in the process of attachment, nor in the affidavit on which it is issued, will prevail as a defense in a suit brought by such officer after he has levied upon the goods.[5] Nor will the fact that he, in his return, described the property as lying in A when it was really in B.[6] For example, the officer may have an action against one who harvests an attached crop when the same was left to ripen. Constructive possession by the officer is all that is required by the statute.[7]

The officer alone can maintain such action, hence if goods attached by a sheriff are replevied by a coroner, the creditor in the original suit can not maintain an action against the coro-

1. Braley *v.* French, 28 Vt. 546; Collins *v.* Smith, 16 Vt. 9; Foulks *v.* Pegg, 6 Nev. 136; Lathrop *v.* Blake, 23 N. H. 46.

2. Robert *v.* Carpenter, 53 Vt. 678. Collins *v.* Smith, 16 Vt. 9.

3. Dayton *v.* Merritt, 33 Conn. 184; Hotchkiss *v.* McVickar, 12 Johns (N. Y.) 403.

As where slaves were emancipated during the pendency of the attachment suit on which they had been seized. Wall *v.* Pulliman, 5 Heisk. (Tenn.) 365.

4. Smart *v.* Batchelder, 57 N. H. 140.

5. Marshall *v.* Marshall, 2 Houst. (Del.) 125.

Nor in the docketing of the suit before a justice of the peace. Marshall *v.* Marshall, 2 Houst. (Del.) 125.

6. Smart *v.* Batcheldor, 57 N. H. 140.

7. Grover *v.* Buck, 34 Mich. 519.

ner, for, as the sheriff had the special property in the goods, he alone can maintain the action against the coroner.[1]

If one deputy sheriff attaches goods, and another deputy of the same sheriff attaches and takes the same goods out of his possession by virtue of the second writ, the first attaching deputy may have an action of trespass *vi et armis* against the sheriff himself, for although the two deputies are servants of the same master, they act independently of each other.[2]

The form of the action which the officer may have against any one who violates his possession or that of his servant or bailee, may be either replevin, trespass or trover.[3] Even though he may have removed the goods out of the state, and they have there been taken from him or his bailee.[4] And even though his bailee gave the defendant permission to take the goods.[5]

Proof of having made seizure of the goods under an attachment is sufficient to sustain his action, without the necessity of producing the judgment.[6] Although the judgment in the attachment suit is admissible to show the amount of the plaintiff's lien, even though such judgment be not rendered until

1. Ladd *v.* North, 2 Mass. 514.

Nor can a creditor join with the officer in an action of trover for the conversion of property by some third person. Schaeffer *v.* Marienthal, 17 Ohio State 183. A judgment of the court finding the right of possession in two defendants may be rebutted by showing exclusive possession in one of them. Schaeffer *v.* Marienthal, 17 Ohio State 183.

2. Walker *v.* Foxcroft, 2 Me. 270.

Disputes between deputies of the same sheriff must be settled by the sheriff, if the dispute arose over property attached by each of them. Perley *v.* Foster, 9 Mass. 112. See also Vinton *v.* Bradford, 13 Mass. 114; Thompson *v.* Marsh, 14 Mass. 269.

The sheriff is answerable for all acts of his deputy, done under color of his office. The act of the deputy is considered in law to be the act of the sheriff himself, and he may be sued for it in trover or trespass, or in any other form of action suited to the nature of the case. Johnson *v.* Edson, 2 Aiken (Vt.) 299.

3. Lathrop *v.* Blake, 23 N. H. 46; Badlam *v.* Tucker, 1 Pick. (Mass.) 389; Ludden *v.* Leavitt, 9 Mass. 104; Perley *v.* Foster, *supra;* Warren *v.* Leland, 9 Mass. 265; Gates *v.* Gates, 15 Mass. 310; Gibbs *v.* Chase, 10 Mass. 125; Whittier *v.* Smith, 11 Mass. 211; Smith *v.* Wadleigh, 18 Me. 95; Barker *v.* Miller, 6 Johns. (N. Y.) 195; Wilbraham *v.* Snow, 2 Saund. (Eng. K. B.) 47a.

4. Brownell *v.* Manchester, 1 Pick. (Mass.) 232.

5. Sinclair *v.* Tarbox, 2 N. H. 135.

6. Barker *v.* Miller, 6 Johns (N. Y.) 195.

after the trespass or conversion.[1] As against a stranger for a tortious taking from the possession of the officer it is not necessary for him to prove a forcible taking to maintain an action of trespass *de bonis asportatis*.[2] And an action by such officer against a subsequent attaching creditor for taking the same property may be maintained, although no demand for it has been made of the defendant upon the execution issued in the first suit previous to the commencement of the action of trespass.[3]

If the attached goods be wrongfully taken away from an officer and he should die before there is an action brought, an action of trover may be maintained by his legal representatives for the benefit of whomsoever it may concern.[4]

§ 262. **Officer's disposition of perishable property.**—When the officer levies upon property of a perishable nature and such as will deteriorate in value by being kept in his possession until the determination of the suit, there will be found, in most states, some statutory provision enabling the court to order a sale of such personal property by the officer who made the levy, and prescribing that the proceeds of such sale be kept in the possession of such officer, or by him paid into court, to await the determination of the attachment proceedings.[5] The authority to sell "perishable" goods which have been seized on attachment is, in some states, limited to such goods as are liable to immediate decay or to perish before the time arrives at which they may be sold in the regular course of the proceedings.[6] And not to property which, by extraordinary exposure, may be liable to loss or destruction, if so situated that its safety can be provided for by the attaching officer.[7] But in other states, the statutory power to sell extends to all chattels liable to depreciate

1. Grover *v.* Buck, 34 Mich. 519.
2. Gibbs *v.* Chase, 10 Mass. 125.
3. Mills *v.* Camp, 14 Conn. 219.
4. Hall *v.* Walbridge, 2 Aik. (Vt.) 215; Badlam *v.* Tucker, 1 Pick. 389.
5. The practitioner will consult his controlling statute, which must be strictly followed, or such sale will not bind the owner. Kirby *v.* Coldwell, 26 Miss. 103.
6. Henisler *v.* Friedman, 5 Pa. L. J. 147; Newman *v.* Kane, 9 Nev. 234. Hay is not.
7. Oneida Nat. Bank *v.* Paldi, 2 Mich. (N. P.) 221.

in value by keeping, or which can not be kept without great and disproportionate expense.[1] For to keep property until it deteriorates in value is to do an injury to all concerned and is certainly not the policy of the law.[2] A statute authorizing a sale of perishable articles applies (at least in North Carolina) to cases of original attachment and not to those against vessels, the attachment of which is authorized by different statute; therefore a sale by the sheriff of a vessel so levied upon is void and does not discontinue the suit.[3]

Among the articles which have been deemed to be perishable are the following: A horse and chaise in New Jersey;[4] a shallop in Pennsylvania;[5] household effects and live stock in Pennsylvania;[6] live animals, fish, fruit, etc., in New York.[7] And goods used by fasionable tailors, the styles in which change every season and which are liable to become hard and unsuitable for use and moth-eaten and injured by dust and dirt.[8]

The object of the statute in giving to the court the power to order the sale of perishable property is to confide a power to be used for the benefit of both parties, and the sheriff to whom the order is issued is not under the control of either the plaintiff or defendant, and neither can stop such sale. The object of the sale is to change the form of the property for the benefit of both, and the proceeds of the sale are to be retained by the officer to be disposed of as the property itself would have been

1. Crocker *v.* Baker, (Mass.) 18 Pick. 407.

2. Schumann *v.* Davis, 13 N. Y. S. 575, 19 Civil Proc. 348.

3. Bryan *v.* The Enterprise Steamer, 8 Jones (N. C.) L. 260.

4. Anon. 18 N. J. L. (2 Harr.) 26.

5. Oniel *v.* Chew, Dall. (Pa.) 379.

6. Baker *v.* Baker, (Pa. Com. Pl.) 28 W. N. C. 300.

It has been held in Massachusetts that when an officer attaches the debtor's cattle that the debtor is obliged to support them or be responsible if they perish. However, if the officer forsake his attachment on account of his apprehension that the cattle will not be supported, he is answerable to the plaintiff. Sewall *v.* Mattoon, 9 Mass. 535. The general rule is that the officer is not to consider the element of expense in keeping or preserving the property. Sewall *v.* Mattoon, 9 Mass. 535; Newman *v.* Kane, 9 Nev. 234; Dean *v.* Bailey, 12 Vt. 142.

7. Zimmerman *v.* Fischer, 13 N. Y. Civ. Proc. 224.

8. Schumann *v.* Davis, 13 N. Y. S. 575, 19 Civ. Pro. 348, 26 Abb. N. C. 125, disapproving Fisk *v.* Spring, 32 N. Y. Supr. Ct. 367.

had it remained in specie. If the officer neglects to sell at the time ordered he does so at his own peril.[1] And when by process of law attached property becomes changed into money in the officer's hands, and he places it so that it accumulates interest, the interest will be treated as an accretion to the money and will belong to the party entitled to the money.[2]

A sale of attached property should never be made unless such property is in the undisputed possession of the officer. No proper order of sale can be made after the attached property has been replevied.[3]

Since an attachment proceeding does not abate at the death of the plaintiff, but continues as a pending cause, an order of sale of perishable property may be made after the plaintiff's death and before the expiration of the time in which the defendant is permitted to show cause why the action shall not be revived.[4]

Parol proof that by reason of the perishable nature of the property, or the cost of keeping it, the sale would be for the benefit of both parties, is generally sufficient to procure the order. The correctness of an order of sale will be presumed in the absence of anything to the contrary.[5]

The owner of the property must have such notice of the sale as the statute prescribes.[6] If the statute require that the officer give the owner of the property written notice of the application for an order to sell, and verbal notice only is given to him of such application, his being present at the appraisal and sale

1. Oeters *v.* Aehle, 31 Mo. 380; State *v.* Judge Civ. Dist. Ct., 44 La. Ann. 87, 10 So. Rep. 405.

The proceeds becoming the attached property, the defendant may obtain it by giving the usual delivery bond required in other cases. State *v.* Judge Civ. Dist. Ct., 44 La. Ann. 87, 10 So. Rep. 405.

2. Richmond *v.* Collamer, 38 Vt. 68. Same principle in Newman *v.* Kane, 9 Nev. 234.

3. Weathers *v.* Mudd, 12 B. Mon. (Ky.) 112.

4. Buller *v.* Woods, 43 Mo. App. 494.

5. Dunn *v.* Salter, 1 Duv. (Ky.) 342.

6. There is, however, no rule of law which would compel the real owner of attached property on notice of the attachment, to intervene and defend *pro interresse suo* on pain of forfeiting his rights of property or of action. Megee *v.* Beirne, 39 Pa. St. 50.

without objecting thereto is a waiver of such irregularity, and good title will pass to the purchaser.[1]

The title acquired by the purchaser of perishable property properly sold is good as against the world.[2] For when the property has been proven to be perishable, the order of sale properly made is indefeasible and unquestionable, whoever the former owner may have been, because the order of sale is a proceeding *in rem*.[3] The title the purchaser gets at a sale of perishable property on an order of the court in compliance with the statute is superior to that of a landlord's lien, even though the landlord's lien was prior to that of the attachment.[4] The purchaser's title is absolute, even though the goods sold were not the property of the defendant in the attachment.[5]

When perishable property is sold by order of court before judgment, it is not essential to the validity of the sale or the preservation of the judgment that a return of the sale should be made on the original writ.[6] But such report must be made as the statute requires.

In the event of the quashing of the attachment proceedings, the proceeds of the sale of the perishable property should be restored to the defendant, for although a judgment for the plaintiff may have been rendered in the main action, the court has no right to direct the proceedings of the sale to be paid over to the plaintiff;[7] nor has the plaintiff a lien upon it. The defendant may claim the money as his own.[8]

1, Walker *v.* Wilmarth, 37 Vt. 289.

2. Young *v.* Kellar, 94 Mo. 581.

3. Megee *v.* Beirne, 39 Pa. St. 50.

But the sheriff, as defendant, is an action of trespass by the real owner can not justify the taking of goods on the ground that by this peculiar law, the title of his vendee was made valid. Megee *v.* Beirne, 39 Pa. St. 50.

4. Betterton *v.* Eppstein, 14 S. W. Rep. 861, 78 Tex. 443.

5. Meyer *v.* Sligh, 81 Tex. 336, 16 S. W. Rep. 1022.

If in such a case the defendant in attachment accounts to the true owner of such goods for their value, it seems the defendant may file a motion to have such amount repaid to him out of the proceeds of the sale; but if his motion fails to show what the goods in question sold for, a demurrer thereto will be sustained. Meyer *v.* Sligh, 81 Tex. 336, 16 S. W. Rep. 1022.

6. Eastman *v.* Eveleth, 4 Met. 137.

7. Petty *v.* Lang, 81 Tex. 238, 16 S. W. Rep. 999.

8. Goldsmith *v.* Stetson, 39 Ala. 183.

He is entitled to the proceeds of the sale, *less the expenses* thereof. He is

§ 263. **Expenses incurred in keeping the property—Compensation of the officer.**—When an officer, while holding and caring for attached property, expends money he must be reimbursed.[1] And if he is charged with waste, he can show that what is alleged to be waste is the result of paying the expenses of keeping the goods.[2] In fact, under one statute, it is declared that when a sheriff attaches personal property he is not allowed to consider the element of expense in its keeping or preservation, but must keep it ready, subject to the judgment of the court.[3] The expenses necessarily incurred in keeping the property together with the legal fees of the officer are to be considered as costs of the suit.[4] If the plaintiff recover in his suit and the property be ultimately sold by the officer under execution, he may deduct these charges, if allowed, out of the proceeds and apply the remainder on the execution. If the judgment goes for the defendant he may look to the plaintiff for reimbursement. If the debtor settles the debt with the creditor so that no execution comes into the hands of the officer on which he may make a sale and thereby reimburses himself for costs, charges and expenses incurred by the care of the property in his hands, he nevertheless has a lien upon such property and may sustain an action to enforce the same by a sale of the property.[5] And in Vermont the charges become, by operration of law, a lien upon the property when it is sold upon the plaintiff's execution.[6]

Where property seized on attachment has been taken out of

entitled to no more, for the sale was as much for his interest as for that of the creditor, and if he had not wanted it so sold he could have procured its release by giving a release bond. Pollard *v.* Baker, 101 Mass. 259.

1. Hanness *v.* Smith, 21 N. J. L. 495.

2. Twombly *v.* Hunnwell, 2 Me. 221.

3. Newman *v.* Kane, 9 Nev. 234.

4. McNeil *v.* Bean, 32 Vt. 429.

5. City Bank *v.* Tucker, 7 Colo. 220; Dean *v.* Bailey, 12 Vt. 142; Bowe *v.* United States Reflector Co., 66 How (N. Y.) Pr. 41; Hall *v.* United States Reflector Co., 66 How (N. Y.) Pr. 31.

6. McNeil *v.* Bean 32 Vt. 429. But not when the attachment is dissolved. Felker *v.* Emerson, 17 Vt. 101.

A sheriff who pays the debts contracted for the supplies of a vessel which he has attached and which vessel he afterwards permits to get into the hands of third persons, does not, by such payment, acquire a lien on the vessel as against a subsequent purchaser without notice. The Schooner Superior, 5 Saw. (U. S.) 346.

the hands of the officer, he is entitled to a reasonable sum for the expense of regaining possession; such retaking is incident to the performance of his duty and he may insist upon being paid if he regained possession in a lawful manner.[1]

In general no compensation is provided for the sheriff, by the statute, for his mere personal care of attached property except fees and his salary; and where there is no statutory provision, any charge by him made, even though sanctioned by the plaintiff's attorney, is illegal and extortionate.[2] It seems that the officer may move the court for the allowance of extra compensation.[3] Neither can the officer, when the law fixes the sheriff's compensation, make a valid agreement with the debtor for any additional compensation. It is contrary to the policy of the law.[4] The compensation allowed to the officer for the care of property in New York, is termed poundage, but he is not entitled to poundage if he has not attached any property which he can sell by virtue of the attachment.[5] A sheriff

1. Rhoads *v.* Woods, 41 Barb. (N. Y.) 471.

If the attaching officer, by the direction of the plaintiff, stores goods and makes himself responsible for the payment of a bill for storage, he may recover the same from the attaching creditor as an item of charge in the account annexed. If the plaintiff's attorney advises such storage, the attorney is responsible for the charges. Tarbell *v.* Dickinson, 3 Cush. (Mass.) 345.

But under the California code, where an attorney has no authority to bind the client, it is not competent for the officer, in an action to recover fees and expenses, to introduce testimony showing that he kept a store (in which goods were attached) running by the instructions of the creditor's attorney and thereby incurred additional expenses. Alexander *v.* Deneveaux, 53 Cal. 663, 59 Cal. 476.

While property attached is to be kept by the officer at the expense of the debtor, Dean *v.* Bailey, 12 Vt. 142, Sewell *v.* Mattoon, 9 Mass. 535, yet even though no agreement has been made with the plaintiff, who has attached animals of the debtor, the officer may recover from the plaintiff the expenses incurred in supporting the animals, and this although the judgment be rendered against the plaintiff. Phelps *v.* Campbell, 1 Pick. (Mass.) 59.

2. King *v.* Shepherd, 68 Iowa 215.

3. Fletcher *v.* Aldrich Circuit Judge, 81 Mich. 186, 45 N. W. Rep. 641.

4. Burk *v.* Webb, 32 Mich. 173.

5. Calhoun *v.* Lee, 29 How. (N.Y.) Pr. 1.

In the city and county of New York the officer is allowed as compensation on the settlement or withdrawal of actions of attachment an amount equal to the rate of poundage on an execution. Bartlett *v.* Jessup, 18 Abb. (N.

who has taken property into his possession by attachment is not entitled to poundage in case of a subsequent settlement of plaintiff's claim before any sale of the property by the sheriff. Poundage is only allowed in case of a sale by virtue of the attachment before judgment; and then only in case a settlement has been had, or a judgment recovered and collected, in whole or in part; and in that case the poundage is to be estimated on the amount collected, or "the amount at which settlement is made."[1]

Where, after the officer has attached a flock of sheep, the debtor was adjudged a bankrupt upon his own petition, and the officer was compelled to keep possession of the sheep until he could legally deliver them to the assignee, it was held that such officer was entitled to a compensation from the assignee for keeping such sheep until claimed and received by the assignee.[2] But where an officer attaches a horse and uses the same sufficiently for the keeping, he can not recover from the attaching creditor for such keeping.[3] Neither can an officer, who acquires illegal possession of property under color of an

Y.) Pr. 448; Muller *v.* Santler, 18 Abb. (N. Y.) Pr. 450, 28 How. (N. Y.) Pr. 87; Jellinghaus *v.* Scheidt, 18 Abb, (N. Y.) Pr. 452.

1. German American Bank *v.* Morris Run Coal Co., 68 N. Y. 585; Ridlon *v.* Flanigan, 19 N. Y. Supreme Court 115.

In such a case he can not, as a matter of right, tax more than eighty-two cents. Alburtis *v.* Dudley, 12 Abb. (N. Y.) Pr. 361, 21 How. (N. Y.) Pr. 456.

Where personal property is attached five dollars for levying, and two dollars per day for keeper's fees, is ample compensation for the sheriff's service, when nothing appears to show that the sheriff was put to any trouble or expense, further than sending a subaltern to the store to take and remain in charge; and it not appearing that there was any difficulty in finding or getting possession of the property. Alburtis *v.* Dudley, 12 Abb. (N. Y.) Pr. 361, 21 How. (N. Y.) Pr. 456.

The officer is not entitled to poundage upon the money and bank notes of the defendant when not taken into his actual custody and he is not chargeable therefor. Ringgold *v.* Lewis, 3 Cranch C. C. 367.

In Tennessee where the statute provides that if the sheriff levies an attachment and the amount shall be satisfactorily settled, he shall be entitled to the same commissions as in cases of executions. The sheriff can claim commissions only upon the amount realized by payment from the defendant after the levy. Shaw *v.* Armstrong, 2 Heisk. (Tenn.) 420.

2. Zeiber *v.* Hill, 1 Sawyer (U. S.) 268.

3. Dean *v.* Bailey, 12 Vt. 142.

attachment, charge the defendant in the attachment for keeping the property.[1] Nor can he retain property which he has no right to attach for the purpose of a reimbursement of money which he has paid to discharge a prior lien upon it.[2] The permanent stationing of the keeper over property, which may be removed, is not warranted by law, and the charge therefor can not be legally included in the taxable costs of the action.[3]

Part II. Possession by Agent of Sheriff.

§ 264. **Officer's power to appoint an agent.**—It is a well established principle of the law of attachment that in order to maintain a lien created by an attachment of personal property, the officer must, in some form, by himself or another, retain the custody of the property; for if possession is abandoned the attachment will be dissolved and another attachment by another officer will be valid.[4] And such possession must be visible, continuous and conclusive,[5] as has been hereinbefore particularly shown. This duty of safely keeping possession of the attached personal property to satisfy the execution which may follow, the officer may perform by himself, or by the agency of a keeper appointed for that purpose.[6] The officer may make such arrangement, upon his own responsibility, as he may think proper. And if he appoint an unfaithful servant, or entrust it to an irresponsible bailee, so that it is lost through the negligence or infidelity of the keeper or the insufficiency of the receiptor, such officer will be responsible for the value of the property.[7]

In quite a number of states and by long practice, it has become a well established law that the officer may give the imme-

1. Gardner *v.* Hust, 2 Rich. (S. C.) 601.

2. Morton *v.* Hodgdon, 32 Me. 127.

3. Cutter *v.* Howe, 122 Mass. 541. As to "Keeper's Fees," generally, see *post*, § 285.

4. Sanderson *v.* Edwards, 16 Pick. (Mass.) 144; Weston *v.* Dorr, 25 Me. 176; Chadbourne *v.* Sumner, 16 N. H. 129.

5. Fitch *v.* Rogers, 7 Vt. 403.

6. Gower *v.* Stevens, 19 Me. 92; Donham *v.* Wild, 19 Pick. (Mass.) 520.

7. Blake *v.* Kimball, 106 Mass. 115. Further as to "Liability of the Officer" see *post*, § 384.

diate custody of the property attached into the hands of some responsible person and take his receipt therefor, conditioned that the property will be returned on demand, or within a certain time after the rendition of judgment, or the like. Such bailee of the officer is usually termed the receiptor or keeper and what is hereinafter said concerning him should not be confounded with the duties or liabilities of a custodian or keeper in other states where such custodian or keeper is the immediate servant of the officer, and holds as the officer himself without a receipt. Nor is the law concerning receiptors in confusion with special statutes of other states which provide for the retaining of the possession of the property by the debtor upon the giving of a forthcoming bond as hereinafter shown.[1] The practice of receipting has been adopted for convenience and has been said to be a very proper course of proceedings; for, as has been said, "it can not be supposed that an officer is personally to take charge of and keep all property he may attach." He may employ an agent or a receiptor for this purpose, whose possession will be the possession of the officer,[2] and the contracts which he may make with such persons to whom he entrusts the goods is as binding and effectual as any other contract between the parties to it.[3] If he leave them in the possession of some one (other than the debtor) who acts for him, it will be sufficient, the purpose being to give notoriety to the attachment.[4] And it seems that the use by the debtor or his family of such articles as are not thereby injured, if by the officer's or agent's permission, does not effect any rights acquired by the attachment.[5] Putting a keeper over them is sufficient to give notoriety to the attachment unless it be done colorably to give the appearance of an attachment where none in truth exists.[6] Putting the property in possession of a receiptor saves expense to all the parties, relieves the officer of the

1. See *post*, § 286.
2. Mitchell *v.* Hinman, 8 Wend. (N. Y.) 667; Hutchinson *v.* Parkhurst, 1 Aik. (Vt.) 258.
3. Hutchinson *v.* Parkhurst, 1 Aik. (Vt.) 258.
4. Baldwin *v.* Jackson, 12 Mass. 131.
5. Baldwin *v.* Jackson, 12 Mass. 131; Train *v.* Wellington, 12 Mass. 495.
6. Young *v.* Walker, 12 N. H. 502.

immediate care or custody of the property and gives the creditor all he seeks for by his attachment, viz., security for his debt.[1]

The act of bailment of attached property by delivering it to a receiptor, although a common practice, is not so far an official act of the attaching officer that he is bound to make the bailment on request of the debtor;[2] and still it is so far official in its character that the sheriff may claim to have made the bailment through his deputy and may maintain an action for non-delivery on request in his own name.[3]

While it has been held in Maine that the taking of a receipt conditioned for the return of the property or to pay a certain sum of money is an abandonment of the attachment so that another officer may lawfully seize it,[4] it is also held that a receipt reciting the attachment and promising to return the property to the officer holding the execution, within thirty days after judgment, and limiting the receiptor's liability to a certain sum, does not dissolve the attachment.[5]

§ 265. **Nature of the receiptor's possession.**—While all the authorities agree that the receiptor is the agent and servant of the attaching officer and that his possession is the possession of the officer,[6] yet there is much conflict of opinion as to the

1. Austin *v.* Burlington, 34 Vt. 506; Moulton *v.* Chadbourne, 31 Me. 152; Holcomb *v.* C. N. Nelson Lumber Co. 39 Minn. 342.

In Louisiana the sheriff is the judicial sequestrator in ordinary cases of attachment, but he is to act only in the event of the parties failing to appoint a fit and proper keeper of their own selection. Frazier *v.* Willcox, 4 Rob. (La.) 517.

And he may then as well retain possession by a keeper or overseer, for whose acts he is responsible as by his deputies. Myers *v.* Myers, 8 La. Ann. 369.

And even though the property attached be a plantation it remains sequestered in the officer's custody until the sale, and he may appoint a keeper. Scott *v.* Davis, 26 La. Ann. 688.

2. Batchelder *v.* Frank, 49 Vt. 90; Moulton *v.* Chadborne, 31 Me. 152; Sibley *v.* Story, 8 Vt. 15.

3. Sibley *v.* Story, 8 Vt. 15; Spencer *v.* Williams, 2 Vt. 209; Davis *v.* Miller, 1 Vt. 9; Smith *v.* Wadliegh, 18 Me. 95. See *post*, § 274, "Action on Receipt."

4. Waterhouse *v.* Bird, 37 Me. 326; Waterman *v.* Treat, 49 Me. 309.

5. Perry *v.* Somerby, 57 Me. 552. See *post*, § 269.

6. Even though the sheriff attach money and leave it in the hands of a third party, who gives to the sheriff a

interest acquired by the receiptor himself. Some hold that he has a sufficient interest in the property to enable him as against a wrong-doer to maintain either trespass or trover.[1] While a greater number hold that the special property remains alone in the officer who made the attachment and that the receiptor is merely the servant of the attaching officer and that he has no interest or title in the property whatever and can bring no action against any one who disturbs him in his possession and that the action must be brought by the officer himself.[2] Neither can a receiptor maintain an action against the defendant in attachment for an amount such receiptor has paid out of property attached to the attaching creditor.[3] The authority for safe keeping is subordinate to that of the officer and he can neither sell nor loan the goods.[4] He may return the possession of the property confided to his care to the officer if he will accept of it.[5] And the officer may demand such possession of the receiptor whenever he may see fit.[6]

The nature of the bailment of attached property seems to be such that when a delivery is made to a receiptor, the lien of the attaching officer is so far relinquished that if the receiptor sell and deliver the same to a *bona fide* purchaser with the assent of the owner, the title will pass, notwithstanding the attachment.[7] But this will not affect the liability of the receiptor on his contract with the officer.[8]

receipt for it, such third party is constituted the keeper of the money seized, and the sheriff himself, to all intents and purposes, is in the legal possession thereof. Watkins *v.* Cawthon, 33 La. Ann. 1194.

1. Burk *v.* Webb, 32 Mich. 173; Poole *v.* Symonds, 1 N. H. 289; Thayer *v.* Hutchinson, 13 Vt. 504; Odiorne *v.* Colley, 2 N. H. 66; Burrows *v.* Stoddard, 3 Conn. 160.

2. Warren *v.* Leland, 9 Mass. 265; Perley *v.* Foster, 9 Mass. 112; Ludden *v.* Leavitt, 9 Mass. 104; Commonwealth *v.* Morse, 14 Mass. 217; Norton *v.* People, 8 Cow. (N. Y.) 137; Dillenback *v.* Jerome, 7 Cow. (N. Y.) 294; Eastman *v.* Avery, 23 Me. 248.

One case did hold that trover should be maintained by him who had possession, but that replevin could only be maintained by him who had a property therein, either general or special. Waterman *v.* Robinson, 5 Mass. 303.

3. Woodward *v.* Munson, 126 Mass. 102.

4. Odiorne *v.* Colley, 2 N. H. 66.

5. Carr *v.* Farley, 12 Me. 328.

6. Woodburn *v.* Munson, 126 Mass. 102. See *post*, § 273.

7. Clark *v.* Morse, 10 N. H. 236.

8. See *post*, § 274.

§ 266. **Who may become a receiptor or bailee.**—The bailment of attached property not being an official act, leaves the officer entirely to his own discretion in delivering the attached property into the hands of third persons. The sheriff's receipt is a contract for his own private security.[1] And as the officer himself is held responsible for the safe custody of the attached property he will, as a matter of self-protection, see that such receiptor is a responsible person. The legal possession being in the officer, he may deliver it to another for safe keeping, who thereby has the legal possession, the invasion of which is trespass. There seems to be no objection to making the attaching creditor a keeper of the property if he is a responsible man and willing to undertake the trust.[2] And no fraud will be presumed thereby.[3] Such plaintiff, however, holds possession as a servant of the officer,[4] and not in his own right, for he has no right to control the possession of attached property during the pendency of the attachment.[5] The officer can, if he choose, deliver the property attached for safe keeping, and take its value in money as security during the pendency of the suit; or he may surrender the property which he has taken from the joint possession of two cotenants to either of them.[6]

It is likewise competent for the attaching officer who seizes property in a warehouse to place the warehouseman as keeper or custodian of the property.[7]

Furthermore, the attaching officer may allow the attached property to remain in the possession of the debtor himself or of his family or of his servant, provided such officer retains control of the property with power to retake it into his possession, making such owner or other person his agent for retaining possession of the property. If he choose to assume such risk there is no rule of law to forbid it.[8] This may render the property liable to a second attachment. But when property

1. Clark *v.* Clough, 3 Greenl. (Me.) 357.
2. Utley *v.* Smith, 7 Vt. 154.
3. Tomlinson *v.* Collins, 20 Conn. 364.
4. See *ante*, § 265.
5. See *post*, § 279.
6. Gassett *v.* Sargeant, 26 Vt. 424.
7. Trounstein *v.* Rosenham, 22 La. Ann. 525.
8. See *ante*, § 251, and *post*, § 392.

attached is receipted for and redelivered to the debtor, the receiptor is liable therefor to the officer, and the officer is bound, at his peril, to have the goods forthcoming according to the terms of the receipt. It makes no difference in this regard whether by the receipt and redelivery, the receiptor became bailee and servant of the officer, to keep the goods as in the custody of the law, or whether he became an original contractor.[1]

The same bailee may act as the keeper of the attached property, both for the attaching officer and for a purchaser under the owner; and on such concurrent possession the priority of legal rights will obtain.[2]

§ 267. **Contents of the receipt.**—The articles attached should be specified in the receipt so that there can be no misapprehension or misunderstanding in regard thereto, and the return of the officer should specify the same. But when this is omitted it will not render the officer liable for anything more than nominal damages, unless special damages be shown.[3]

When there is a clerical error (misprision) in the form of a receipt, such mistake in name is not such a variance as to vitiate the receipt, the court will correct it by construction, when it is apparent on the face of the instrument that the error exists and in what manner it should be corrected to carry out the intentions of the parties.[4]

§ 268. **Effect of mentioning in the receipt the value of the property attached.**—The valuation named in the receipt given for attached property has ever been justly considered as conclus-

1. Wentworth *v.* Leonard, 4 Cush. (Mass.) 414. See further as to "Liability of Receiptor," *post*, § 274.

2. Wheeler *v.* Nichols, 32 Me. 233. Further as to the sale of attached property, when in possession of the owner, see *post*.

3. Bruce *v.* Pettengill, 12 N. H. 341. The receipt reading, "October 19, 1836. Value received, we promise to pay John Pettengill, deputy sheriff, four hundred dollars, on demand and interest, said note being security to said Pettengill for a writ, Calvin Bruce *v.* Tenny and Gould, which is this day sued," and duly signed, was held to be a receipt, on which a party giving it could be held. Bruce *v.* Pettengill, 12 N. H. 341.

4. Marion *v.* Faxon, 20 Conn. 486. Same principle in Richmond *v.* Woodard, 32 Vt. 833.

ive upon the parties in an action upon such contract.[1] It is considered as a stipulation of the extent of such receipt as security.[2] The receiptor is, by stipulating as to the value of the property receipted for, estopped from denying either the attachment,[3] or the value of the property attached.[4] And this, even though the property receipted for had no existence at the time the receipt was given.[5] The valuation named in the receipt is conclusive as between the officer and the receiptor, whether such valuation be more or less than the valuation of the property attached.[6] Even in an action upon a receipt to pay a stipulated sum of money, or deliver the property on demand (or if no demand was made, then thirty days after the rendition of judgment), it was held that the fact that the officer attached property greater in value than he was directed in the writ to attach could not be shown.[7]

When a portion of the property attached and receipted for has been taken from the possession of the receiptor in such manner as to discharge his liability to that extent, and the value of the property receipted for is expressed in the receipt as an entire sum, and an action be brought upon the receipt, the damages are to be determined by assuming the value of the whole property receipted to be the sum specified in the receipt,

1. Drown *v.* Smith, 3 N. H. 299; Parsons *v.* Strong, 13 Vt. 235.

2. Jones *v.* Gilbert, 13 Conn. 507; Stevens *v.* Stevens, 39 Conn. 474.

3. But see *post*, § 283.

4. Anthony *v.* Comstock, 1 R. I. 454; Enscoe *v.* Dunn, 44 Conn. 93; Easton *v.* Goodwin, 22 Minn. 426.

5. Stevens *v.* Stevens, 39 Conn. 474; Jones *v.* Gilbert, 13 Conn. 507.

This holding is on account of the officer's responsibility to the creditor. Jones *v.* Gilbert, 13 Conn. 507.

6. Anthony *v.* Comstock, 1 R. I. 454; Spear *v.* Hill, 52 N. H. 323; Parsons *v.* Strong, 13 Vt. 235.

Parol evidence is inadmissible in an action by an officer against the receiptor upon the receipt as to the value of the property attached. Parsons *v.* Strong, 13 Vt. 235.

For example, if a receiptor promises the officer that he will redeliver the articles, or pay $500, stating in writing that the articles are of that value, he will not be permitted to prove that the articles were overvalued, nor that such articles had fallen in price; nor that, on the day of the demand, he offered other articles of the same kind, of as great value as those attached. Smith *v.* Mitchell, 31 Me. 287.

7. Hunter *v.* Peaks, 74 Me. 363.

and then ascertaining the just proportion, which the property retained by the receiptor would bear to the property for which he gave the receipt.[1]

§ 269. **Abandonment by bailee dissolves attachment—What is such an abandonment.**—What has been hereinbefore said regarding the abandonment of personal property is also applicable in this connection.[2] The possession of the receiptor being the possession of the officer, an abandonment by the receiptor will be an abandonment by the officer. If the receiptor allows the goods to come into the hands of the attachment defendant and thereby loses control over them it will constitute an abandonment, and the attachment will be *ipso facto* dissolved.[3] But every possession by the debtor, with permission of the receiptor, is not an abandonment. The bailee may retain his possession *bona fide* and from motives of humanity permit the defendant to use attached articles when the same will not be injured by such usage and the attachment will not be thereby dissolved.[4] In all such cases the receiptor is the servant or keeper for the officer and the debtor is the same for the receiptor.[5] And the receiptor must retain control of such property with power to retake it into his possession.[6] If the receiptor permits the defendant to hold and use the property as owner, the attachment is regarded as being so far dissolved that the property may be attached by another officer, who has no knowledge that a prior attachment is still subsisting.[7] Fur-

1. Allen *v.* Carty, 19 Vt. 65. See *post*, §§ 274–283, as to action on the receipt, measure of damages, and proof of set-off in defense.

2. See *ante*, § 256.

3. Dunklee *v.* Fales, 5 N. H. 527; Hill *v.* Wiggin, 31 N. H. 292; Baker *v.* Warren, 6 Gray (Mass.) 527.

4. Train *v.* Wellington, 12 Mass. 495; Baldwin *v.* Jackson, 12 Mass. 131; Farrington *v.* Edgerly, 13 Allen (Mass.) 453; Young *v.* Walker, 12 N. H. 502.

5. Small *v.* Hutchins, 19 Me. 255.

6. Weston *v.* Dorr, 25 Me. 176, and *ante*, § 265.

7. Whitney *v.* Farwell, 10 N. H. 9; Bicknell *v.* Hill, 33 Me. 297; Beach *v.* Abbott, 6 Vt. 586. See further as to "Abandonment," *ante*, § 256.

Where the bailee abandoned property left in his charge, for a period of two weeks, the attachment was considered to be released. In such case it was said not to be for the benefit of the defendant that the attachment was dissolved, but for the benefit of third parties, whose rights should be guard-

thermore, there is nothing to prevent the receiptor from delivering the goods to the owner of them when the defendant has no title thereto; for the principle that goods attached are in the custody of law does not apply in such a case.[1]

When a receiptor, for attached goods, delivers them to or allows them to remain with the attachment debtor, even though he has not lost control over them, such debtor may sell them and the general property will pass to the purchaser.[2] If such possession by the owner was as a bailee and not as owner, so that there is no abandonment, such sale will be subject to the attachment lien.[3] When the lien still subsists, the debtor can make no disposition of the attached property to the prejudice of the rights of the attaching creditor or officer.[4] But the general rule is that the delivery of the attached goods by the receiptor to the defendant legally operates as a discharge of the attachment and terminates the attaching officer's special property in them.[5] If, however, only a portion of such goods is sold, the unsold portion is still the special property of the attaching officer.[6]

Where a mortgagee, even though he is a nominal vendee under a bill of sale, receipts for the same to an attaching officer, the attaching creditor's lien becomes superior thereby to that of the keeper as mortgagee, even though he was in possession at the time the attachment was made; and he can not defeat the attachment lien by a sale of the interest he had acquired by reason of the bill of sale. By accepting the trust as keeper he is estopped from denying the validity of the attachment lien.[7]

When the attaching officer has delivered the goods attached

ed with great strictness. Russell *v.* Major, 29 Mo. App. 167.

1. Rogers *v.* Weir, 34 N. Y. 463; Robinson *v.* Mansfield, 13 Pick. (Mass.) 139.

2. Denny *v.* Willard, 11 Pick. (Mass.) 519.

3. Denny *v.* Willard, 11 Pick. (Mass.) 519.

4. Woodman *v.* Trafton, 7 Me. 178.

5. Robinson *v.* Mansfield, 13 Pick. (Mass.) 139; Bridge *v.* Wyman, 14 Mass. 190; Dunklee *v.* Fales, 5 N. H. 527; Pond *v.* Baker, 58 Vt. 293.

But as to the "Liability of the Receiptor" see *post*, §§ 274–284.

6. Rowe *v.* Page, 54 N. H. 190.

7. Moresi *v.* Swift, 15 Nev. 215.

to a bailee on a good receipt and such receiptor allows them to remain in the custody of the debtor, the officer may retake them from the debtor if such officer still has the writ in his possession.[1]

If a receiptor of attached property delivers it to a third person whose servant removes it to a distance and leaves it, trespass may be maintained against the servant, even though at the time he may have been ignorant of the sheriff's interest in the property.[2]

The special property of the attaching officer in the goods attached is not terminated by the goods being carried into an adjoining state for safe keeping and there given into the hands of a bailee, taking his receipt for the same.[3]

§ 270. **Receiptor not under control of creditor.**—The receipt taken by an officer for goods attached is a contract for his own private security.[4] As the bailee is selected by the officer and not by the creditor he becomes an agent of the officer and not of the creditor. The keeping of the property is a duty which the officer owes to the creditor and he may perform it personally or by his agent selected for that purpose.[5] The receiptor's agreement is not with the creditor, and there is no privity between them. The officer is the one who is liable to the creditor whether the receiptor be liable to him or not. The receipt is for the protection of the officer and not for the protection of the creditor.[6] It is the official duty of the officer, he alone being clothed with the requisite power, to retake the property at any time he deems it necessary for him to secure it.[7] The creditor has a right to suppose that the officer is the actual keeper at all times, and it is with that supposition that he gives his execution, when obtained, to the officer for him to levy it forthwith and proceed and sell according to law.[8]

1. Bond *v.* Padelford, 13 Mass. 394.
2. Sinclair *v.* Tarbox, 2 N. H. 135.
3. Brownell *v.* Manchester, 1 Pick. (Mass.) 232.
4. Clark *v.* Clough, 3 Greenl. (Me.) 357.
5. Gilbert *v.* Crandall, 34 Vt. 188; Rider *v.* Sheldon, 56 Vt. 459.
6. Shepherd *v.* Hall, 77 Me. 569.
7. Gilbert *v.* Crandall, 34 Vt. 188; Meshew *v.* Gould, 30 La. Ann. 163.
8. Bliss *v.* Stevens, 4 Vt. 88.

It seems, however, that while the creditor has no right to control the receipt taken by the officer for attached goods, yet if the officer should place such receipt in the hands of the creditor's attorney to be prosecuted for his benefit, this is an equitable assignment of such receipt.[1] Furthermore, if the plaintiff's attorney instructed the officers to take the receipt of a certain individual for the goods attached, or approves the same after it is so taken, this is an adoption thereof by the creditor for his own benefit, and he acquires thereby an equitable interest founded on a sufficient consideration which has long been recognized and protected by the courts.[2] But it has been held that, although the officers take a receipt on advice of the creditor, he is still liable to him for the misfeasance or negligence of the receiptor, but in such case he will be liable for no more than has actually been lost by such misfeasance or negligence.[3]

§ 271. Continuation of officer's liability for acts of receiptor.—An officer who has attached property on a writ, and delivered the same to a third person upon his own responsibility, is still liable to the parties, by virtue of the attachment, for the safe keeping and legal disposition of such property.[4] But a sheriff is not liable for goods receipted for by a deputy of his predecessor, even though the same person be a deputy of his when the execution in the suit upon which the attachment was made was placed in his hands.[5]

§ 272. When liability of officer, who has delivered goods to a receiptor, ceases.—When an attaching officer accepts a receipt or appoints a keeper at the request, by the advice, or with the consent of the plaintiff, he and not the officer is responsible for the sufficiency of the one or the fidelity of the other.[6]

1. Clark *v.* Clough, 3 Me. (3 Greenl.) 357.

2. Farnham *v.* Gilman, 24 Me. 250.

And the officer is discharged from his liability to the plaintiff for not retaining possession. But this does not release the receiptor. Farnham *v.* Gilman, 24 Me. 250. See *post* § 272. As to "Action of Receipt" see *post*, § 274.

3. Pierce *v.* Strickland, 2 Story, 292. As to "Action on Receipt" see *post*, § 274.

4. Torrey *v.* Otis, 67 Me. 573.

5. Tomlinson *v.* Collins, 20 Conn. 364.

6. Donham *v.* Wild, 19 Pick. 520.

If the plaintiff gives his written approval of a receipt taken by the officer

If an officer has been instructed by an attorney who has received a writ from his client to take such writ and levy it on certain property, and to take a receipt for it from a certain person, and the officer complies with these instructions, he will be relieved from liability to produce the property to be taken in execution,[1] and it has been further held, that the delivery of a receipt to the creditor's attorney, with his acceptance, releases the officer from responsibility.[2] But it is also said that an officer is not exonerated from an effort to find the goods held by a receiptor because the plaintiff has approved of such receiptor's ability to return the property. Nor is he relieved from the duty of bringing a suit upon the receipt.[3]

Closely allied to the principle that the officer is not responsible for more than ordinary care,[4] and not for tortious acts of his bailee, committed without his knowledge or consent,[5] it has been held that when an officer delivers attached goods for safe keeping to a person apparently in good circumstances, such officer will not be liable to the creditor if the goods are lost thereafter through the insolvency of such person.[6] But other states have held that the officer is liable for the infidelity of a keeper, the irresponsibility of a bailee, or the insufficiency of the receiptor to the extent of the value of the property.[7] And

and returned to the plaintiff, the officer is discharged from liability to him for the goods. Jewett *v.* Dockray 34 Me. 45.

1. Rice *v.* Wilkins, 21 Me. 558; Jenny *v.* Delesdernier, 20 Me. 183. Farnham *v.* Gilman, 24 Me. 250.

2. Howard *v.* Whittemore, 9 N. H. 133.

3. Allen *v.* Doyle, 33 Me. 420; Pierce *v.* Strickland, 2 Story 292.

4. See *ante*, § 251.

5. Barron *v.* Cobleigh, 11 N. H. 557.

6. Runlett *v.* Bell, 5 N. H. 433; Howard *v.* Whittemore, 9 N. H. 133; Bruce, *v.* Pettengill, 12 N. H. 341.

And if the creditor, in such case, adopts the officer's act by bringing suit in his name, against the bailees, he precludes himself from disputing their sufficiency. Runlett *v.* Bell, 5 N. H. 433. But a discharge of the defendant in bankruptcy after judgment rendered in the attachment suit was held not to discharge the bailee. Smith *v.* Brown, 14 N. H. 67. Although the petition in bankruptcy was filed before the judgment was rendered. Kittredge *v.* Warren, 14 N. H. 509; Towle *v.* Robinson, 15 N. H. 408; Lamprey *v.* Leavitt, 20 N. H. 544.

7. Cooper *v.* Mowry, 16 Mass. 5; Phillips *v.* Bridge, 11 Mass. 242; Donham *v.* Wild, 19 Pick. (Mass.) 520.

that if the goods be lost or wasted, or the bailee become insolvent, the officer is still liable.[1]

If the attached property has been left with the debtor the officer is released from any claim made by him, and if the attaching creditor has released the officer from his liability to him, then, as neither the creditor nor the debtor has any claim upon the officer, he is entirely released from liability.[2]

When the attaching creditor, who has obtained a judgment in the attachment suit, fails to take out an execution within the time limited by statute for that purpose after the entry of judgment, the liability of the officer who attached the goods and delivered them to a receiptor ceases.[3]

§ 273. **Officer may at any time demand property delivered on receipt.**—The officer has, by the attachment, a special property in the goods, which he does not part with by delivering them to a receiptor, and when returnable on demand he may retake them at any time he deems it to be necessary for his security.[4] And this he may do before demand of payment on the execution, and even before judgment.[5]

At any time while the attachment is in force the officer may take the attached goods from the possession of the debtor to whom the receiptor has entrusted them; and so may the receiptor himself.[6] Such a retaking will be particularly justifiable where the receiptor has become irresponsible, as by insolvency, and the officer is in danger of being held liable to the creditor without indemnity.[7]

1. Pierce *v.* Strickland, 2 Story, 292; Gilbert *v.* Crandall, 34 Vt. 188.

2. Moulton *v.* Chapin, 28 Me. 505; Norris *v.* Bridgham, 14 Me. 429. The same principle in Shumway *v.* Carpenter, 13 Allen (Mass.) 68.

And in such a case he can maintain no action against the receiptor. Shumway *v.* Carpenter, 13 Allen (Mass.) 68. Further as to "Action Against Receiptor," see *post*, § 274.

3. Stackpole *v.* Hilton. 121 Mass. 449.

4. Gilbert *v.* Crandall, 34 Vt. 188; Briggs *v.* Mason, 31 Vt. 433; Pierson *v.* Hovey, 1 D. Chipman (Vt.) 51; Rood *v.* Scott, 5 Vt. 263; Kelly *v.* Dexter, 15 Vt. 310; Parks *v.* Sheldon, 36 Conn. 466.

5. Jones *v.* Gilbert, 13 Conn. 507.

6. Bond *v.* Padelford, 13 Mass. 394; Carr *v.* Farley, 12 Me. (3 Fairf.) 328.

7. Carr *v.* Farley, 12 Me. 328.

§ 274. **Action against the receiptor and on the receipt—(a) Nature of the action—When it will lie.**—For injury to property while in the receiptor's possession or under his control, the officer may proceed against him as against any other wrong-doer,[1] or he may bring an action against him on his receipt. The receipt existing between the officer and the person to whom he delivers the goods for safe keeping is a personal contract between them which is as binding as any other contract.[2] It is founded upon a valid consideration which is the giving of possession on the part of the officer and the promise to return it on the part of the receiptor.[3] And this consideration can not be disputed.[4] The liability of the receiptor to the sheriff is absolute so long as the responsibility for the return of the property rests upon the latter, and can be discharged only by the act of God or the public enemy,[5] or by the consent of the officer.[6] When a receipt has been given for property and it has been redelivered to the debtor, the receiptor is nevertheless liable to the officer, and whether he becomes a bailee or servant of the officer for the purpose of keeping the goods as it were in custody of the law, or whether he becomes liable as an original contractor, bound, at his peril, to have the goods forthcoming according to the terms of his receipt.[7] But it can not be extended beyond its terms and legal effects. It imparts a liability only to the parties to the suit in which the seizure was made.[8] The officer can maintain an action on the receipt only because of his accountability to the attaching creditor, or to the owner of the property attached. If the circumstances are such that he is accountable to neither he can not recover.[9] And while the receipt is usually absolute and unconditional in its terms and conclusive in respect to its recitals

1. See *ante* 265.

2. Clark *v.* Clough, 3 Me.357; Hutchinson *v.* Parkhurst, 1 Aikens (Vt.) 258.

3. Clark *v.* Gaylord, 24 Conn. 484.

4. Morrison *v.* Blodgett, 8 N. H. 238; Bell *v.* Shafer, 58 Wis. 223. See further *post*, § 283.

5. Cornell *v.* Dakin, 38 N. Y. 253.

6. Torrey *v.* Otis, 67 Me. 573. See as to "When the Action will not Lie," *post*, § 275.

7. Wentworth *v.* Leonard, 4 Cush. (Mass.) 414.

8. Bell *v.* Shafer, 58 Wis. 223.

9. Sanford *v.* Pond, 37 Conn. 588; Allen *v.* Carty, 19 Vt. 65. See further next succeeding section.

and admissions, it is nevertheless by operation of law contingent. The officer has no personal interest in the property or in the possession of it, and when his special property terminates his right to maintain an action ceases.[1] This is true whether the receipt is under seal or otherwise.[2] The liability of the receiptor depending upon the liability of the officer who took the receipt when the property is demanded of the attaching officer on execution in season to charge him, the receiptor's liability is fixed, although the property be not demanded of him within the time fixed by the statute for making the demand on execution.[3] It makes no difference whether the receiptor has possession of the goods or not, so long as he has receipted for them he is bound to fulfill his contract.[4] Neither is it of any avail to him that the debtor, to whom he delivered the attached partnership property, was indebted to the partnership of which he was a member, in a greater amount than the value of the property, and that the property was absorbed in

1. Fowler *v.* Bishop, 31 Conn. 560.

2. Dayton *v.* Merritt, 33 Conn. 184.

3. Allen *v.* Carty, 19 Vt. 65.

When a plaintiff receives a final judgment at a term of court which ends in Saturday, Monday will be the first day on which the party may take out execution; and that day is to be excluded in the computation of the thirty days within which property attached must be demanded from the attaching officer by the officer who holds the execution, in order to charge the property. Allen *v.* Carty, 19 Vt. 65.

Although the attachment may have been dissolved by delivery of the property by the receiptor to the debtor, the officer is damnified and the receiptor is liable on the receipt. Colwell *v.* Richards, 9 Gray (Mass.) 374.

When the goods have been demanded within thirty days after judgment, and have not been delivered up to be taken in execution, the receiptor is not discharged by the subsequent commitment of the debtor on the execution, and the bringing of the suit and the recovery of a judgment thereon by the creditor against him and his surety for an escape on a bond given by them for the prison limits. Twining *v.* Foot, 5 Cush. (Mass.) 512.

Nor can an attaching creditor, who has obtained judgment and taken the steps necessary to perfect the lien under his attachment, release the reeeiptor's obligation to the officer while he retains his judgment against the debtor, even though the officer declares his liability to the creditor as his ground of action in the writ made before the attempted release. Torrey *v.* Otis, 67 Me. 573.

4. Dillenback *v.* Jerome, 7 Cow. (N. Y.) 294; Miller *v.* Adsit, 16 Wend. (N. Y.) 335.

satisfying such indebtedness. Nor will it make any difference if the debtor never had any interest in the property.[1]

§ 275. (b) **When the action will not lie.**—Since the attaching officer can maintain an action on a receipt only because of his accountability to the attaching creditor or to the owner of the property attached,[2] it follows that if any circumstances arise which render the officer no longer liable to either of the parties to the attachment suit he can have no action against the receiptor.[3]

When an assignment is made of the property attached in a manner that will discharge the attachment, no action thereon can be maintained against the receiptor, for his liability is at an end.[4] And the fact that he had taken an indemnity against any loss he might sustain, does not enlarge his liability.[5]

In fact a dissolution of the attachment always discharges the receiptor from his engagement to redeliver the attached goods to the officer, unless the officer is still accountable for them to the debtor.[6] This is true, though the dissolution be occasioned by the debtor's going into bankruptcy.[7] Or upon the debtor's filing a bill of insolvency and applying the attached property to the liquidation of his debts.[8]

If, after judgment is obtained in the attachment suit, no

1. Staples *v.* Fillmore, 43 Conn. 510.

And where the debtor was discharged in bankruptcy on a petition filed before judgment was rendered in the attachment suit, the receiptor who had delivered the property to him was held to be nevertheless liable on his receipt. Lamprey *v.* Leavitt, 20 N. H. 544; Towle *v.* Robinson, 15 N. H. 408; Kittredge *v.* Warren, 14 N. H. 509.

2. Sanford *v.* Pond, 37 Conn. 588.

3. Sanford *v.* Pond, 37 Conn. 588; Plaisted *v.* Hoar, 45 Me. 380; Shaw *v.* Laughton, 20 Me. 266; Sawyer *v.* Mason, 19 Me. 49; Roberts *v.* Carpenter, 53 Vt. 678.

4. Butterfield *v.* Converse, 10 Cush. (Mass.) 317.

5. Sprague *v.* Wheatland, (Mass.) 3 Metc. 416.

6. Buel *v.* Metcalf, Kirby (Conn.) 40; Parsons *v.* Phillips, 1 Root (Conn.) 481; Knap *v.* Sprague, 9 Mass. 258; Phillips *v.* Bridge, 11 Mass. 242; Jewett *v.* Torrey, 11 Mass. 219; Howard *v.* Smith, 12 Pick. (Mass.) 202; Strong *v.* Hoyt, 2 Tyler, (Vt.) 208; Catlin *v.* Lowrey, 1 D. Chipman (Vt.) 396.

7. Mitchell *v.* Gooch, 60 Me. 110.

8. Wright *v.* Morley, 150 Mass. 513, 23 N. E. Rep. 232; Wright *v.* Dawson, 147 Mass. 384; Shumway *v.* Carpenter, 13 Allen (Mass.) 68. Compare, *ante*, § 271.

steps be taken to charge the property by demand on execution within the time limited therefor by the statute, no action can be had against the receiptor, because the liability of the officer himself is thereby at an end.[1]

No action can be maintained against the receiptor upon his receipt after the attached property, which has been in his possession, is returned into the hands of the attaching officer.[2] And if the officer who made the first attachment levy a second attachment upon the same property and take it into his own hands, this will terminate the liability of the receiptor.[3]

The receiptor will be relieved from liability on his receipt for an attached vessel if the attaching officer himself take a receipt therefor from the owner and she be sent to sea.[4] Likewise the receiptor's liability will be at an end when the attaching officer sells the property before demand and by the mutual consent of the attaching creditor, the debtor, and the receiptor; because such a sale is an implied rescission of the contract evidenced by the receipt, notwithstanding the fact that the sale be made under the direction of the receiptor and operate for their benefit and the proceeds be paid into their hands.[5]

The release of the receiptor from liability for injury or loss of goods occasioned without negligence upon the part of the receiptor depends, of course, upon the degree of care required of him in the state where the bailment was made.[6] In Tennessee trover at least will not lie against the receiptor for property which is lost or which has ceased to exist, before the termination of the suit, because where there is no negligence there can be no conversion.[7] But Massachusetts holds to the most stringent rule and makes him absolutely liable; as where a horse was attached, and, after being left in the debtor's possession, died through no fault of any one, the receiptor was held liable. And where swine had been attached and left with the debtor,

1. Frost *v.* Kellogg, 23 Vt. 308. See Allen *v.* Carty, 19 Vt. 65. See above section.
2. Kelly *v.* Dexter, 15 Vt. 310.
3. Rood *v.* Scott, 5 Vt. 263.
4. Richardson *v.* Kimball, 28 Me. 463.
5. Kelly *v.* Dexter, 15 Vt. 310.
6. See *ante*, §§ 251, 252 and 265.
7. Wall *v.* Pulliam, 5 Heisk. (Tenn.) 365.

was by him killed, converted into pork and sold, the receiptor was held liable to the full value of the swine before being killed.[1] But a contrary rule is followed in Maine.[2] And in Vermont it is a well settled rule that the receiptor is not liable on his receipt when the property receipted for has perished without his fault.[3]

Where exempt property has been attached and yet allowed to remain in the debtor's possession, and a third party has receipted for it, he is not liable on his receipt if the creditor has not been prevented from attaching property which was not exempt.[4]

And although the bailee may have given a receipt for the property, yet if it should so happen that the debtor was not the owner of such property at the time of the attachment and that the property has been surrendered to the true owner, the receiptor will not be liable to an action on the receipt.[5]

Furthermore, it seems that in Vermont and New Hampshire the receiptor will not be liable to an action when the attaching creditor has amended his declaration so as to increase his lien upon the property attached beyond the amount originally intended to be sued for.[6] But an amendment of the original writ of attachment, discharging one of the defendants, does not in any wise lessen the liability of the receiptor.[7] Nor in Massachusetts does the filing of a new count after the attachment has been made and of goods delivered to a receiptor, discharge him from his responsibility to the officer.[8] The last named state holds to a more rigid rule regarding receiptors than the other states, as has been hereinbefore shown.

§ 276. (c) **When demand is necessary before bringing suit.** —The necessity of making a demand before commencing an

1. Thayer *v.* Hunt, 2 Allen (Mass.) 449.

2. Shaw *v.* Laughton, 20 Me. 266.

In this case a horse being part of the property receipted for, dying within the time limited for delivery without fault of the receiptor, he was held not to be liable.

3. Ide *v.* Fassett, 45 Vt. 68.

4. Stone *v.* Sleeper, 59 N. H. 205.

5. Penobscot Boom Co. *v.* Wilkins, 27 Me. 345.

6. Austin *v.* Burlington, 34 Vt. 506; Laighton *v.* Lord, 29 N. H. 237.

7. Smith *v.* Brown, 14 N. H. 67.

8. Miller *v.* Clark, 8 Pick. (Mass.) 412.

action upon a receipt will, of course, depend upon the terms of the receipt on which the action is to be brought. The receipt being conditioned to return the property on demand (which is the general condition), a demand is absolutely necessary to fix the liability of the receiptor to the attaching officer and no action can be maintained until such demand has been made.[1] And it seems the inability of the receiptor to redeliver the property does not avoid the necessity of making a demand in order to fix his liability.[2]

The demand must be made of the receiptor by whatever officer holds the execution[3] But he can not make the demand unless he holds the receipt.[4] And when such officer is another than the attaching officer he must state by what authority he makes the demand. If his right to claim the property is not questioned, the authority claimed by him will be thereby admitted by the receiptor.[5] The receiptor must be notified, by the officer making such demand, that he holds the execution.[6]

The officer *may*, at any time, during the pendency of the attachment, demand of the receiptor that he return the property, and a neglect to comply with such request will subject him to damages to the amount of the property.[7] And there is a time in which such demand *must* be made, or the attachment will be dissolved, and the receiptor released from liability to an action

1. Bacon *v.* Thorp, 27 Conn. 251; Wetherell *v.* Hughes, 45 Me. 61; Carpenter *v.* Snell, 37 Vt. 255.

2. Bicknell *v.* Hill, 33 Me. 297; Pearsons *v.* Tincker, 36 Me. 384.

3. Davis *v.* Miller, 1 Vt. 9; Bradbury *v.* Taylor, 8 Me. (8 Greenl.) 130; Pearsons *v.* Tincker, 36 Me. 384.

4. Davis *v.* Maloney, 79 Me. 110; Moore *v.* Fargo, 112 Mass. 254; Stewart *v.* Platts, 20 N. H. 476.

When the receipt has been taken in accordance with the instruction of the creditor, or he has elected to rely upon it rather than the obligation of the officer to keep the property in safety, and such creditor is in possession of the receipt, the demand upon the receiptor can not be made by the attaching officer. He can make no legal demand for property of the receiptor, unless he is in possession of the receipt. The creditor being the equitable assignee of the receipt may make demand upon it and enforce it. Davis *v.* Maloney, 79 Me. 110.

5. Phelps *v.* Gilchrist, 28 N. H. 266.

6. Walbridge *v.* Smith, Brayton 1 (Vt.) 173.

7. Catlin *v.* Lowrey, 1 D. Chipman (Vt.) 396; Pierson *v.* Hovey, 1 D. Chipman (Vt.) 51; Gilbert *v.* Crandall, 34 Vt. 188; Briggs *v.* Mason, 31 Vt. 433; Rood *v.* Scott, 5 Vt. 263; Kelly *v.* Dexter, 15 Vt. 310; Jones *v.* Gilbert, 13 Conn. 507. See *ante*, § 273.

thereon. This time is the period fixed by statute within which a demand must be made on execution issuing on the judgment obtained. However, when the liability of the attaching officer has been fixed by a demand upon him within the time limited after judgment, by statute, for making a demand upon the execution, it seems, the demand may be made upon the receiptor after the expiration of such time.[1] But, it seems, that where the officer holding the execution is not the officer who took the receipt, a demand must be made by him upon the receiptor within the time limited by the statute for making demands on execution.[2] However, the receiptor may deliver the property after the expiration of such time.[3]

A personal demand upon the receiptor seems not to be always necessary. A demand at his dwelling-house may be sufficient.[4] Even though the same may be in his absence.[5] But a demand left at the receiptor's dwelling-house will not be sufficent when he is absent from the state.[6] If a personal demand is made of the receiptor while he is absent from his residence it is meet that he should be allowed a sufficient time to return the property. However, if he has disposed of it, a demand made of him anywhere is sufficient.[7]

Where there have been several attachments against the same property, and a person has become a receiptor for such property in all cases, a demand in one case is sufficient to fix his liability for all of them, if judgment and execution has been had in all of the cases.[8] A demand for the delivery of the goods upon one of two joint receiptors and his refusal to deliver the goods are sufficient to support an action on the re-

1. Allen *v.* Carty, 19 Vt. 65; Stewart *v.* Platts, 20 N. H. 476.

This case holds that an action on the receipt is not barred by a payment of the judgment by the debtor. It would not be so barred in any case unless the debtor was in possession of the property or unless the attaching officer had in some manner released the receiptor from obligation to him.

2. Stewart *v.* Platts, 20 N. H. 476.

3. Merrill *v.* Curtis, 18 Me. 272.

4. Mason *v.* Briggs, 16 Mass. 453.

5. Mason *v.* Briggs, 16 Mass. 453. See, also, Barney *v.* Weeks, 4 Vt. 146; Remick *v.* Atkinson, 11 N. H. 256.

6. Sanborn *v.* Buswell, 51 N. H. 573.

7. Gilmore *v.* McNeil, 46 Me. 542.

8. Hinckley *v.* Bridgham, 46 Me. 450.

ceipt against both.[1] But if the action be not upon the contract, but for a tort, a demand must be made upon both.[2]

The defendant's liability does not become fixed immediately upon the demand. An action does not accrue against him until there has been a neglect to comply with such demand after reasonable time has been given him. This is the rule in all cases where there is a specific thing to be done on demand, such as the delivery of property or performance of service. The question of neglect is always a question for the jury to determine.[3]

It is not necessary in order to maintain an action against the receiptor that he *refuse* to deliver the property on demand. His liability is fixed by his *failure to deliver*.[4] But neglect to return on demand, the property for which the receipt was given, will, at any time, subject the receiptor to damages for the amount of the property.[5]

§ 277. (d) Return of property on demand ends receiptor's liability.—When a proper demand is made upon a receiptor, and he returns the attached property held by him, the end for which the receipt was given has been attained and the receiptor has canceled his obligation in regard thereto. The property returned by the receiptor must be the identical property for which the receipt was given after the attachment was levied thereon.[6] And it must be delivered to the person specified in the promise to return.[7] The receiptor must be given a reasonable time within which to return the property after the demand is made as hereinbefore shown.[8] And a bailee is not justified in holding property an unreasonable time because of adverse claimants, if the plaintiff offers him a bond of indemnity; such holding is a conversion, and if he has great doubts as to the rightful owner it seems he may begin an action in equity by bill of interpleader to discover the true owners.[9]

1. Griswold *v.* Plumb, 13 Mass. 298.
2. White *v.* Demary, 2 N. H. 546.
3. Jameson *v.* Ware, 6 Vt. 610.
4. Scott *v.* Whittemore, 27 N. H. 309.
5. Catlin *v.* Lowrey, 1 D. Chipman (Vt.) 396.
9. Gilmore *v.* McNeil, 46 Me. 532.
7. Smith *v.* Wadleigh, 18 Me. 95.
8. See *ante*, § 274.
9. Ball *v.* Liney, 48 N. Y. 6.

§ 278. (e) When demand is not necessary before bringing suit.—When a receipt contains the sole condition that the receiptor will redeliver the property within a stated number of days after the rendition of judgment, no demand of him for the return of the property is necessary before bringing an action on the receipt. The expiration of the time, without a return of the property, fixes his liability.[1] And when the receiptor gives a receipt containing the alternate conditions that he will redeliver the property on demand, or if no demand is made then within a specified time after the judgment is obtained in the action he will deliver it, no demand upon him is necessary; the expiration of the specified time fixes his liability.[2] A receipt conditioned, to redeliver the property on demand and if no demand be made within a certain number of days from the rendition of judgment to redeliver the property at a place named and notify the officer thereof, is a legal contract; and the officer can maintain an action for the breach of it, without making a demand, and without giving notice of the time when the judgment was rendered, if it appear that one of the receiptors was a party to the suit.[3] And it seems, the receiptor is liable without demand being made upon him within the time specified, when he has allowed the owner of the goods to remain in possession and to carry them beyond the reach of the attaching officer, provided such attaching officer continues to be answerable to the attaching creditor.[4]

When a receiptor mortgages property to pay his own debts, such act constitutes a conversion and no demand is necessary before bringing suit therefor.[5]

When two persons sign a receipt for property attached and one of the co-receiptors sells it, the permission of the sheriff to the other co-receiptor to recover it is equivalent to a demand.[6]

1. Hodskin *v.* Cox, 7 Cush. (Mass.) 471.

2. Low *v.* Dunham, 61 Me. 566; Humphreys *v.* Cobb, 22 Me. 380; Wentworth *v.* Leonard, 4 Cush. (Mass.) 414.

3. Shaw *v.* Laughton, 20 Me. 266. And the same principle maintains in Massachusetts. Hodskin *v.* Cox, 7 Cush. (Mass.) 471.

4. Webster *v.* Coffin, 14 Mass. 196.

5. Stevens *v.* Eames, 22 N. H. 568.

6. Carr *v.* Farley, 12 Me. 328.

§279. (f) **Who may maintain the action against a receiptor.** —An action on the receipt must be brought by the person or officer holding the receipt, for no one else has a right to demand it.[1] If the plaintiff in the attachment suit is in possession of the receipt and he elects to rely upon it, he will be considered as the equitable assignee thereof, and may assert it without demand upon the attaching officer.[2] But if the receipt has been delivered to the attaching creditor unindorsed, the action should be brought in the name of the attaching officer.[3] Where the attaching officer has taken a receipt, conditioned for the delivery of the goods to any specified person, the officer may maintain an action on the receipt for a breach of such contract.[4]

Where the receipt has been taken by a deputy sheriff, the sheriff, claiming the bailment to have been made by himself through the medium of his servant, may maintain an action thereon in his own name for the benefit of the person interested in the return of the property,[5] or the deputy may sue in his own name.[6] And where a deputy has bailed the attached property and the sheriff's term of office (and of course that of the deputy) has expired before the judgment is recovered, the new sheriff may seasonably demand the goods of the attaching officer, and he in turn may maintain an action for its recovery from the bailee.[7]

A person with authority to serve a writ, after attaching property and delivering it to a receiptor, may maintain an action upon the receipt against the receiptor in his own name, if the receiptor after due demand by a legal officer refuse to deliver the property to be disposed of upon the execution.[8]

1. Davis *v.* Maloney, 79 Me. 110; Moore *v.* Fargo, 112 Mass. 254.

2. Davis *v.* Maloney, 79 Me. 110.

But this will not dispense with a necessity to make a demand upon the receipt.

3. Moore *v.* Fargo, 112 Mass. 254.

This will, of course, be controlled by the local practice regarding the bringing of suits in the name of assignees, indorsees and parties interested therein.

4. Smith *v.* Wadleigh, 18 Me. 95.

5. Sibley *v.* Story, 8 Vt. 15; Spencer *v.* Williams, 2 Vt. 209; Baker *v.* Fuller, 21 Pick. (Mass.) 318; Davis *v.* Miller, 1 Vt. 9.

6. Spencer *v.* Williams, 2 Vt. 209.

7. Bradbury *v.* Taylor, 8 Me. 130.

8. Maxfield *v.* Scott, 17 Vt. 634.

Trover will lie against the receiptor of attached property, whether the action is brought by the sheriff to whom the receipt was given, or in his name for the benefit of those whose rights are affected.[1] A deputy sheriff may maintain the action.[2] The receiptor is liable to any officer to whom the execution is given, when a proper demand has been made of him and he has neglected or refused to return the property; except in some states in the case of the death of animals without fault of the receiptor.[3] Furthermore, it has been held in one case that after a conversion the title is in the owner and he may take it from the wrong-doer. If there has been a sale of the property, the wrong-doer can set up the sale in mitigation of damages.[4]

Trespass may be maintained for the taking of goods; and this, it seems, by the receiptor himself where attached goods have been placed in the hands of another person for safe keeping, for the possession of the goods is constructively with the receiptor.[5]

An action may be maintained by an assignee for his individual interest in property which has been attached for the debt of one of the owners and sold by a receiptor into whose hands it was given, where the receiptor before the attachment signed a contract with the owners to hold the property for them and to sell and account to them for it.[6]

§ 280. (g) **Form of the action.**—While assumpsit will lie upon a receipt which promises to deliver the goods or their value,[7] yet an action sounding in tort is oftener brought, because it is generally a more efficient remedy in such cases. Either replevin or trover will lie when there has been a refusal, on demand, to deliver the attached property.[8]

Trover will lie in an ordinary case in favor of the officer against the receiptor of goods attached, if the latter fails to de-

1. Stevens *v.* Eames, 22 N. H. 568.
2. Bradbury *v.* Taylor, 8 Me. 130.
3. Cross *v.* Brown, 41 N. H. 283. See *ante*, § 275.
4. Ball *v.* Liney, 48 N. Y. 6.
5. Burrows *v.* Stoddard, 3 Conn. 160.
6. Eldridge *v.* Lancy, 17 Pick. (Mass.) 352.
7. Holt *v.* Burbank, 47 N. H. 164; Dezell *v.* Odell, 3 Hill (N. Y.) 215.
8. Dezell *v.* Odell, 3 Hill (N. Y.) 215.

liver them on demand, unless the officer's liability has been discharged and the receiptor's liability to him is thereby canceled,[1] or unless animals have died without the receiptor's fault in states considering this a discharge of obligation to return the property.[2] Trover will lie against the receiptor of attached property whether the action is brought by the sheriff to whom the receipt was given, or for the benefit of those whose rights are affected.[3] The receiptor, by his receipt, acknowledge that he has "found" the property claimed in the suit, and, having promised to return it, he will be liable in trover when he fails to do so on demand.[4] And if on the back of this receipt he acknowledges such demand it is sufficient evidence to prove the conversion.[5]

Replevin may be maintained when goods have been wrongfully taken from the hands of the receiptor,[6] even though the goods have been wrongfully attached in the hands of the bailee and delivered on a receipt to a third party, and they afterwards get into the hands of the bailee, the attachment being thereby dissolved.[7]

1. Pettes *v.* Marsh, 15 Vt. 454; Holt *v.* Burbank, 47 N. H. 164; Webb *v.* Steele, 13 N. H. 230.

A deputy sheriff served an attachment writ and made a return. His bondsmen feared they might be made to pay a loss and induced the debtors to give a receipt, with surety, for the attached property. One of the bondsmen and the defendants in the original action agreed that payment should be made to the deputy in the presence of the bondsmen. After judgment was obtained in the main action and an execution put into the hands of the deputy a demand for the property was made in an action begun against the receiptors. About this time the money was paid to the deputy sheriff, not in the presence of the bondsmen, and the execution discharged by the deputy, who paid only a part of the money to the creditors, and the bondsmen were compelled to pay the balance. It was held, in an action upon the receipt brought in the name of the deputy sheriff for the benefit of the bondsmen, that the payment made by the deputy was legal and must go to the reduction of damages, notwithstanding the fact that the money was not paid to the deputy in the presence of the bondsmen as per agreement. Holt *v.* Burbank, 47 N. H. 164.

2. Cross *v.* Brown, 41 N. H. 283.

3. Stevens *v.* Eames, 22 N. H. 568.

If the sheriff, to whom a receipt of property has been given, assents to the conversion of the same by the receiptor, he thereby waives his claim upon the receipt. Stevens *v.* Eames, 22 N. H. 568.

4. Webb *v.* Steele, 13 N. H. 230.

5. Cargill *v.* Webb, 10 N. H. 199.

6. Carr *v.* Farley, 12 Me. 328.

7. Small *v.* Hutchins, 19 Me. 255; Lathrop *v.* Cook, 14 Me. 414.

Trespass may be maintained for the taking and that, it seems, by the receiptor himself, for he has constructive possession, though the goods have been placed in the hands of another person for safe keeping.[1]

§ 281. (h) **Pleading in the action.**—When a plaintiff has delivered attached property to the defendant for safe keeping on a receipt to deliver on demand, and an action is brought on such receipt after neglect or refusal to return the property, he may allege in his declaration the delivery of attached property, the taking of the receipt, the making of the demand and the defendant's neglect or refusal; this will be sufficient without averring that judgment or execution has been obtained in the attachment suit.[2] He need not aver the writ and proceedings thereunder; and if he does not he will not be under the necessity of proving it.[3]

§ 282. (i) **Proof necessary to sustain the action.**—The proof in an action against the receiptor will, of course, be governed by the form of the action and will be the same as is required in other like actions. When the officer brings suit upon the receipt for property attached by him, he need not show an actual attachment of the property and delivery therefor to the receiptor by any other evidence than his return and the receipt itself.[4] The proof of the writ and the proceedings thereafter are not necessary, unless they have been made so by the declaration of the plaintiff.[5] The officer who holds the execution is a competent witness to prove that a proper demand was made.[6] And proof of previous demand may be made by showing the admission of such demand indorsed on the back of the receipt by the receiptor.[7] But such an admission is not sufficient proof of the continuance of the lien upon the property, or that the demand was made within the required time after the rendition of the judgment.[8] Leaving a written demand for

1. Burrows *v.* Stoddard, 3 Conn. 160.
2. Farnham *v.* Cram, 15 Me. 79.
3. Lowry *v.* Cady, 4 Vt. 504.
4. Stimson *v.* Ward, 47 Vt. 624.
5. Lowry *v.* Cady, 4 Vt. 504.
6. Allen *v.* Carty, 19 Vt. 65.
7. Cargill *v.* Webb, 10 N. H. 199.
8. Fowles *v.* Pindar, 19 Me. 420.

the property at the receiptor's house or delivering it to him personally is not sufficient evidence either of a breach of the receiptor's contract or of a conversion of the property.[1] Nor is a conversion proved by showing that a sheriff attached property and delivered it to a bailee upon his written agreement to redeliver it upon demand; that the debtor used the property for his temporary convenience; that the sheriff afterward (the contract of bailment existing unrescinded) attached and sold the property upon another writ; that a subsequent demand of the property was made upon the bailee and he omitted to deliver it.[2] But a joint conversion may be proved by showing that two persons receipted for the property and that one of them converted it with the knowledge of the other who did not interfere to prevent the conversion; that a subsequent demand was made upon him who did not convert it and that he did not comply with the demand.[3]

§ 283. (j) **Proof in defense of the action.**—It happens not infrequently that the receiptor has in an action against him on the receipt a good defense thereto. The liability of the receiptor for property attached being limited by that of the officer, it follows that when the receiptor can show that the officer is no longer holden to any of the parties to the attachment suit such receiptor will be discharged from any liability to the attaching officer.[4] It is a *prima facie* defense to show that when the receipt was given there was but one attachment on the property; that the property went back into the possession of the debtor, and that the debt for the collection of which the attachment was brought was settled before the sheriff made a demand upon the receiptor. Or that the receiptor has made him satisfaction therefor, provided the officer is answerable for the goods to the debtor only.[5] And, at most, in a case where it can be shown that the goods have gone back into the possession of the debtor, he being entitled to them, only nominal

1. Phelps *v.* Gilchrist, 28 N. H. 266.
2. Young *v.* Walker, 12 N. H. 502.
3. Stevens *v.* Eames, 22 N. H. 568.
4. Sawyer *v.* Mason, 19 Me. 49.
5. Whitney *v.* Farwell, 10 N. H. 9; Whittier *v.* Smith, 11 Mass. 211; Cooper *v.* Mowry, 16 Mass. 5; Lathrop *v.* Cook, 14 Me. 414.

damages can be recovered against the receiptor.[1] But where the officer who made the attachment has, while the goods were in the bailee's hands, returned them as attached on another creditor's suit and the bailee refused to redeliver the goods to the officer on demand, the officer may maintain an action against the receiptor and it will be no defense or mitigation of damages that the goods were restored to the debtor, or disposed of for his benefit, or that the debt for which they were attached is satisfied, so long as the officer is answerable for them on the second attachment.[2]

That the goods attached and receipted for do not belong to the defendant in the attachment suit may or may not be a defense to an action by the officer on the receipt, according to the court in which the action is brought. It has been said in Minnesota that whether or not the receiptor may discharge his liability in such suit by proving in defense that the property attached and receipted for does not belong to the debtor but to a third person, is to be determined by ascertaining from the terms of his contract, as applied to the circumstances under which it was executed, whether it is a contract of indemnity or an express assurance for a certain amount or value of attached property whereby he assumes an absolute liability, or a mere contract of bailment for the safe-keeping and return of specific chattels.[3] Many courts hold that the receiptor may prove, in an action against him by the attaching officer on the receipt, that the property did not belong to the debtor and could not lawfully be applied to the payment of the attaching creditor's demand,[4] or that some of the goods attached were not the goods of the debtor and that others were not attachable,[5] and that the

1. Farnham *v.* Cram, 15 Me. 79.

2. Whittier *v.* Smith, 11 Mass. 211; Jewett *v.* Torrey, 11 Mass. 219; Webster *v.* Coffin, 14 Mass. 196; Knap *v.* Sprague, 9 Mass. 258; Jenney *v.* Rodman, 16 Mass. 464; Hartshorn *v.* Halsey, 1 Root (Conn.) 92; Maples *v.* Peck, 1 Root (Conn.) 140; Reed *v.* Tousley, 1 Root (Conn.) 374.

3. Mason *v.* Aldrich, 36 Minn. 283, 30 N. W. Rep. 884.

4. Learned *v.* Bryant, 13 Mass. 224; Denny *v.* Willard, 11 Pick. (Mass.) 519; Fisher *v.* Bartlett, 8 Me. (8 Greenl.) 122; Sawyer *v.* Mason, 19 Me. 49; Drew *v.* Livermore, 40 Me. 266; Lathrop *v.* Cook, 14 Me. 414; Fisher *v.* Bartlett, 8 Me. 122.

5. Bacon *v.* Daniels, 116 Mass. 474.

defendant is not estopped by his receipt.[1] The burden of proof in such cases is upon the defendant.[2] Such lack of title in the debtor can not be proved by showing that such debtor has a larger execution against the creditor, which the officer has been required to set-off; for the officer has a right to the goods that he may restore them to the debtor.[3] Other courts hold that a receiptor for property attached becomes liable to the officer if he does not deliver the property to him on demand, and that he can not make excuse by showing that the defendant named in the writ has no title to the property attached.[4] Or by showing that such goods were mortgaged if the mortgagee has not made demand upon him for the property.[5] It has been said, in Maine, that, in any event, the officer has the right to call the property out of the possession of the receiptor; and even if, at the time of the attachment, the property did not belong to the debtor, but to a third person, that circumstance alone will not constitute a defense in an action by the officer against the receiptor; for the officer must obtain possession of the property in order that he may restore it to its true owner.[6]

Likewise some courts permit one, who has receipted for property delivered to him by an officer who has taken it on attachment, to show in defense to an action upon the receipt that the property receipted for was, at the time of the attachment, his own property and not liable to attachment, and that he then so informed the officer; and that such showing entitles him to a judgment in his favor.[7] Other courts maintain that a receiptor can not defend against an action on his receipt by showing that the property was his own and that he had so informed the officer;[8] even though he signed the receipt upon

1. Johns *v.* Church, 12 Pick.(Mass.) 557.

2. Burt *v.* Perkins, 9 Gray 317.

3. Jenney *v.* Rodman, 16 Mass.464.

4. Clark *v.* Gaylord, 24 Conn. 484.

5. Scott *v.* Whittemore, 27 N. H. 309.

After a demand by the officer for property receipted for, an offer by him to receive it upon terms which are not complied with is not a waiver of his previous demand. Scott *v.* Whittemore, 27 N. H. 309.

6. Fisher *v.* Bartlett, 8 Me. 122.

7. Adams *v.* Fox, 17 Vt. 361; Jones *v.* Gilbert, 13 Conn. 507; Bleven *v.* Freer, 10 Cal. 172.

8. Drew *v.* Livermore, 40 Me. 266; Lathrop *v.* Cook, 14 Me. 414; Sawyer *v.* Mason, 19 Me. 49; Dezell *v.* Odell, 3 Hill (N. Y.) 215.

the officer's telling him he could better reclaim the property than if he should let it be moved;[1] because they claim that by giving his receipt he is estopped from controverting the debtor's title to the goods.[2]

However, a bailee of goods who has given his receipt to a deputy sheriff, promising to redeliver them to the sheriff on demand, and who afterwards converts them to his own use, is not estopped by such receipt from showing in *an action of trespass against him by the debtor*, that the goods were his own property.[3]

The debtor may show, in New Hampshire, in an action on the receipt, by the attaching officer to whom he has given the receipt, that another officer who had previously attached the goods had a better title to them than the plaintiff, and that he had delivered the goods to such former attaching officer.[4]

The receiptor, in some states, can not deny the delivery to him of the goods after having acknowledged the same in writing in consequence of which the officer has made himself responsible for the goods to the creditor.[5] Or that he signed for more than he received upon representations of the officer that he would be holden for so much only as was actually delivered,[6] or that the goods are still in his possession;[7] or that no such goods were actually attached,[8] though it be a matter of fact that the attachment was a nominal one and that the officer never seized the goods;[9] nor can he set up a want of consideration;[10] for the stipulation in the receipt is an absolute one.[11] It being said that however strong may be the objections against

1. Bursley *v.* Hamilton, 15 Pick. (Mass.) 40.

2. Dewey *v.* Field, 4 Met. 381.

3. Barron *v.* Cobleigh, 11 N.H. 557.

4. Webster *v.* Harper, 7 N. H. 594. And the plaintiff can not maintain his action by showing in rebuttal that the writ on which the first attachment was made was fraudulent, unless he can also show that the defendant was a party to the fraud. Webster *v.* Harper, 7 N. H. 594.

5. Stimson *v.* Ward, 47 Vt. 624; Bowley *v.* Angire, 49 Vt. 41; Spencer *v.* Williams *et al.*, 2 Vt. 209.

6. Bowley *v.* Angire, 49 Vt. 41.

7. Bell *v.* Shafer, 58 Wis. 223.

8. Allen *v.* Butler, 9 Vt. 122; Spencer *v.* Williams, 2 Vt. 209; Lowry *v.* Cady, 4 Vt. 504.

9. Jewett *v.* Torrey, 11 Mass. 219.

10. Morrison *v.* Blodgett, 8 N. H. 238.

11. Page *v.* Thrall, 11 Vt. 230; Catlin *v.* Lowrey, 1 D. Chipman (Vt.) 396.

the propriety of the proceedings on the part of an officer who returns an attachment of goods, of which he never took possession, or which never had any existence, yet the persons who have acknowledged in writing the receipt of the goods described as legally attached, are not permitted to deny the actual receipt or contest the validity of the attachment.[1] But in Massachusetts it is competent in an action against a receiptor, for said receiptor to show that no attachment of the goods had actually been made.[2]

The fact that the goods were exempt from attachment, and that the receiptor has declared that fact to the attaching officer at the time of the attachment, is a good defense in an action on such receipt by the attaching officer; and such showing will entitle the receiptor to a judgment in his favor.[3] Evidence is admissible in such an action to show that some of the goods were not attachable and that some were not the property of the debtor.[4] But the debtor must, at the time the attachment is being made, make his claim that the property is exempt, for if he does not, but gives his receipt to the attaching officer, he is estopped from setting up that fact later; for did the attaching officer know of the exemption of that certain chattel at the time he levied the attachment he might have levied on some other.[5] The receiptor can not, under any circumstance, defend himself on an action on his receipt by showing that the attaching officer had made an excessive levy by seizing property of greater value than was specified in the writ.[6]

1. Allen *v.* Butler, 9 Vt. 122.

2. Lyman *v.* Lyman, 11 Mass. 317; Bailey *v.* Jewett, 14 Mass. 155.

3. Halbert *v.* Soule, 57 Vt. 358; *contra* Smith *v.* Cudworth, 24 Pick. (Mass.) 196.

4. Bacon *v.* Daniels, 116 Mass. 474.

Where a receiptor gave a receipt under seal agreeing that the property attached as the property of the defendant was his, and that on demand the receiptor would return them to the officer or pay him the amount of the debt and costs recovered in a suit against the defendant, it was held in an action on the receipt that it could not be shown in defense that some of the property was not the property of the defendant in the attachment at the time of the levy and that other goods were not attachable. Bacon *v.* Daniels, 116 Mass. 474.

5. Buzzell *v.* Hardy, 58 N. H. 331.

6. Dezell *v.* Odell, 3 Hill (N. Y.) 215; Hunter *v.* Peaks, 74 Me. 363; Parsons *v.* Strong, 13 Vt. 235.

Whether or not the defendant, in an action on a receipt, can release himself from liability by showing that the debtor is an insolvent or has been declared a bankrupt, depends upon the construction of the receipt as given by the court in passing upon it. If the receipt is deemed to be absolute in its terms, it can not be shown in defense;[1] but if it is considered a conditional contract not holding the receiptor for the loss of property when the same is not occasioned by his fault, then such insolvency or bankruptcy will be a good defense when the receiptor has allowed the owner to retake or retain possession of the property, and it has been lost thereby. The courts holding to these different degrees of liability have hereinbefore been pointed out.[2]

In an action against the bailee on his receipt for property taken in an attachment, he can not set up that the sheriff who attached the goods was not a duly authorized officer acting within the scope of his authority,[3] unless it is made to appear that the suit is prosecuted solely for the benefit of the officer, and not for the benefit of the creditor in the suit upon which the attachment was made.[4]

The character of the judgment rendered in the attachment suit is not, in Maine, a matter of which the bailee, in an action against him on his receipt, can avail himself. Receiptors of property attached can not impeach the judgment rendered in the suit against the defendant; and even if no judgment is rendered, they are accountable to the officer.[5] The receiptor is bound to surrender the attached property on demand, even though a judgment has not yet been granted. He can not even impeach a fraudulent judgment.[6]

Set-off is, however, available on the part of the defendant in an action on the receipt. Although a defendant is liable for

1. Towle *v.* Robinson, 15 N. H. 408.
2. See *ante*, §§ 274 and 275.
3. Jewett *v.* Torrey, 11 Mass. 219.
4. Taylor *v.* Nichols, 29 Vt. 104.
5. Brown *v.* Atwell, 31 Me. 351.
6. Bangs *v.* Beacham, 68 Me. 425. But the attaching officer representing the attaching creditor may impeach a fraudulent debtor. Bangs *v.* Beacham, 68 Me. 425. See *post*, § 357, "Liability of Executive Officer," "Defense."

the whole property attached, yet if he substitute other property in lieu of that attached, which substituted property is sold and applied on execution, then whatever sum the property sold for should be applied to reduce the amount for which he is liable on his receipt.[1]

§ 284. (k) **Judgment in an action against receiptor.**—It is proper for the officer to recover of a delinquent receiptor, the full value of the property, and not merely the amount of the debt; because the officer is accountable to the debtor for the surplus.[2] Even though a judgment to the amount of the judgment in attachment be sufficient to protect the creditor, the debtor's interest must be protected; for such debtor may, because of neglect in taking judgment for the full value, bring an action of "case" for the deficiency.[3] The measure of damages, when the property has been allowed to go back into the hands of the debtor, is the value of the property when the same is not more than the plaintiff's demand.[4] A judgment recovered by the creditor against the receiptor becomes a dead letter whenever the debt is paid to the creditor, because the judgment against the receiptor is merely collateral to the debt. Its purpose is to secure the sheriff, and its force ceases when his liability to both the debtor and creditor ceases.[5] Furthermore, equity will interfere and enjoin a suit brought against a receiptor for the amount of the property attached, after the judgment in the attachment suit has been paid by the execution debtor.[6]

The amount of the judgment to be rendered in an action against the receiptor will depend, of course, upon the extent of the liability as determined by the courts in which the action is brought. The different degrees of liability have been pointed out hereinbefore and need not be reconsidered in this connection.

1. Sewell *v.* Sowles, 13 Vt. 171.

2. Bissell *v.* Huntington, 2 N. H. 142; Catlin *v.* Lowrey, 1 D. Chipman (Vt.) 396.

However, he is not accountable to the debtor until a reasonable time has elapsed for recovering it of the receiptor if the property was delivered to him by the debtor's consent. Bissell *v.* Huntington, 2 N. H. 142.

3. Bissell *v.* Huntington, *supra*.

4. Cross *v.* Brown, 41 N. H. 283.

5. Paddock *v.* Palmer, 19 Vt. 581.

6. Paddock *v.* Palmer, 19 Vt. 581.

When two writs are levied upon the same property and two receipts are taken by the attaching officer from the same receiptor, and on demand on one of the receipts the receiptor pays the amount of the judgment, he can, in an action on the second receipt, only be held for the amount of the property less the amount paid on the first judgment.[1]

§ 285. **Fees and costs of bailees.**—While the very essence of the contracts of receipting for attached property is that the debtor in the attachment suit may be saved the expense of keeping the attached property, yet the costs and expenses of the bailees and agents of the attaching officer may be recovered against the defendant if the attachment is sustained, and against the plaintiff if it is not sustained as has been hereinbefore indicated. This is often provided for by special statute.

In New York it has been said that, in a possessory action, if the defendant does not wish the expense of a keeper of attached property he should make application to the court for the withdrawal of the keeper, otherwise the attaching officer will be allowed entire keeper's costs.[2]

In Massachusetts while the charges of a keeper or custodian are not legal fees included in the costs to be taxed,[3] yet a contract made with the keeper of attached property for their safe keeping is valid. The officer who makes the contract can not break it for the reason that he has no one to fall back upon for the payment of these services of the keeper.[4]

1. Haynes *v.* Tenney, 45 N. H. 183.
2. The Canal Boat Independent, 9 Ben. (U, S. Dist. of N. Y.) 489.
3. Cutter *v.* Howe, 122 Mass. 541.
4. Stowe *v.* Buttrick, 125 Mass. 449. As to the recovery of sheriff's fees, see Gower *v.* Stevens, 19 Me. 92.

CHAPTER XIII.

RELEASE OF POSSESSION OF ATTACHED PROPERTY.

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Part I. By Bond to Deliver Property.

§ 286. **Of bonds, generally.**—In many states where no practice has been established of receipting for the property in

the manner hereinbefore shown, special statutes have provided a means whereby a debtor, whose property has been seized by attachment, may at any time before final judgment, give a bond with sufficient surety, conditioned as required by such state, and have the possession of his property surrendered to him. It will be noticed that while the practice of receipting is founded wholly upon custom, the law, regarding bonds for the return of property attached, is wholly statutory, and that while the effect of the former is to continue the liability of the officer for the safe keeping of the property, the effect of the latter is to fix such responsibility upon the parties, principal and sureties, to the bond.

The provisions and practice regarding bonds are far from uniform, but in general there are two kinds of bonds to procure the release of property from the possession of the attaching officer. One kind contains the principal condition, that if judgment in the attachment suit be rendered against the defendant the property shall be forthcoming to satisfy the execution on such judgment; otherwise that the sureties will be bounden to the extent, in some instances of the value of the property, and in other instances to the amount of the indebtedness. These bonds are variously called "bail bonds," "forthcoming bonds," and "delivery bonds." Such bonds, of course, only release the property from the custody of the officer and do not release it from the lien of the attachment. Another class of bonds contains the principal condition that the defendant in the attachment suit will " perform whatever judgment may be entered against him," in such attachment suit, and in default thereof, and, in the event that judgment is entered against such defendant, that the sureties will pay the amount thereof. A bond of this class not only releases the officer from further liability as to the care and custody of the property, but also releases the property itself from the lien of such attachment; working an entire dissolution of the attachment so far as the property is concerned and thereafter the bond itself is held as a substitute of the *res*.

Many states provide for the employment of one or the other

of the above named kind of bonds, and in some states bonds are given with the alternate condition to return the property or pay the judgment. And since a bond for the release of property and payment of judgment in the event that judgment be entered against the defendant is similar in its nature to a bond given in a replevin suit, the statutes of some states provide that a replevin bond may be given, usually in double the amount of the plaintiff's demand or in double the value of the property attached, and that thereupon the attached property shall be returned to the possession of the attachment debtor. In Texas two ways are open to the defendant to procure the release of property which has been attached. (1) He has a right to replevy the property by giving bond with sureties for the amount of the debt or the value of the property, as he may choose, conditioned that he return the specific property in case he be unsuccessful in the suit, or (2) he may also, at any time before final judgment, upon giving special bail, with good and sufficient sureties for the amount of the debt and interest, recover the possession of the property so attached from the person in whose hands it may be,[1] but the giving of such special bail is an appearance of the defendant and the suit thereafter proceeds as in ordinary cases.[2]

When the property of joint debtors, tenants in common, or partners, has been attached, such property can not be released unless proper bonds be given by all. Bail can not be given for the discharge of the property belonging to one debtor when the property of two, as joint debtors, has been attached; for a discharge of the property of the one who has so given bond

1. Kennedy *v.* Morrison, 31 Tex. 207.

2. Kennedy *v.* Morrison, 31 Tex. 207. See further as to the giving of the bond for the release of property being a personal appearance, *post*, § 288.

As to the practice in Alabama of giving a replevin bond for the release of attached property, see Roswald *v.* Hobbie, 85 Ala. 73, 4 So. Rep. 177; Chastain *v.* Armstrong, 85 Ala. 215; Rhodes *v.* Smith, 66 Ala. 174; Cordaman *v.* Malone, 63 Ala. 556; Agnew *v.* Leath, 63 Ala. 345; Sartin *v.* Weir, 3 Stew. & P. (Ala.) 421.

As to the practice in Tennessee, see Upton *v.* Phillips, 11 Heisk. (Tenn.) 215; Boyd *v.* Buckingham, 10 Humph. (Tenn.) 434; Gillaspie *v.* Clark, 1 Tenn. 2; Richards *v.* Craig, 8 Baxter (Tenn.) 457; Connell *v.* Scott, 5 Baxter

would also discharge the property of the other joint debtor who has not given bond.[1]

§ 287. **Sufficiency of delivery or forthcoming bond.**—The statute providing for the release of attached property upon the giving of a sufficient bond, conditioned for the redelivery or forthcoming of the property when needed to satisfy the execution issued upon a judgment obtained in favor of the plaintiff in the attachment suit, always provides that such bond may be given by the attachment defendant, and some statutes further permit it to be done by the person in whose possession the property is found.[2] Others permit a stranger to give it in the absence of the defendant,[3] when given for his benefit,[4] and still others that it may be given by a stranger though the defendant be not absent when the possession is thereby to be obtained for him.[5] In Georgia there is no statute authorizing an agent to execute a forthcoming bond for property levied upon by attachment, but where the bond was executed by the principal through his agent, the attachment creditor was permitted to recover when the allegation of such act was sustained by competent proof.[6] And in Minnesota the defendant alone is authorized to execute such bond and receive possession of the attached property. A stranger to the attachment suit can not do so even though he has an interest in the attached property.[7]

But a bond can not be executed by a party not authorized by law to give such bond to the officer or plaintiff so as to constitute it an effective or a reliable security to such officer or

(Tenn.) 595; Snell *v.* The State, 2 Swan (Tenn.) 343; Hughes *v.* Tennison, 3 Tenn. Ch'y. 641.

As to the practice in Georgia, see Craig *v.* Herring, 80 Ga. 709, 6 S. E. Rep. 283; Irvin *v.* Howard, 37 Ga. 18.

And as to the practice in Mississippi, see Montague *v.* Gaddis, 37 Miss. 453; Gray *v.* Perkins, 12 Sm. & M. (Miss.) 622; Wharton *v.* Conger, 9 Sm. & M. (Miss.) 510.

1. Magee *v.* Callan, 4 Cranch C. Ct. 251.

2. King *v.* Hubbell, 42 Mich. 597.

3. Rhodes *v.* Smith, 66 Ala. 174; Cordaman *v.* Malone, 63 Ala. 556.

4. Kirk *v.* Morris, 40 Ala. 225.

5. Wheeler *v.* McDill, 51 Wis. 356.

6. Gilmer *v.* Allen, 9 Ga. 208.

7. Kling *v.* Childs, 30 Minn. 366.

plaintiff. If one, not so authorized by law, undertakes to execute such instrument, it will not be sustained either as a statutory or common law bond.[1]

Most statutes relating to delivery or forthcoming bonds provide that the bond shall be conditioned that such property shall be produced to satisfy any execution that may be issued on any judgment to be recovered by the plaintiff in such attachment, fixing the extent of the penalty in default thereof at double the amount of the demand specified in the affidavit or else double the value of the goods. But under one statute which provided that the sheriff should surrender the goods on the giving of a bond in double the value of the goods conditioned to be void if the goods be returned, "unless" the judgment be paid, a bond was given to the sheriff, on a surrender of goods attached, conditioned that it should be void if the goods should be returned after judgment to satisfy the execution, "or if" the judgment should be paid, it was held that inasmuch as the value of the goods attached was less than the amount of the judgment, the bondsmen were liable only for the amount of the goods.[2] In one case where the plaintiff in attachment gave a bond in a sum which was one dollar less than double the amount sworn to, he was allowed to amend the bond when the sureties consented thereto.[3]

In Michigan, the forthcoming bond must run to the sheriff who holds the property in trust, and the plaintiff in the attachment has no right to sue on such bond or to transfer it until failure of execution, and then only in the sheriff's name, unless the sheriff has assigned such bond to him.[4] In Kansas a forthcoming bond is valid when it runs to the officer and not to the plaintiff in the attachment.[5] But in Alabama such bond (re-

1. Cummins *v.* Gray, 4 Stew. & P. (Ala.) 397; Sewall *v.* Franklin, 2 Porter (Ala.) 493.

2. Pearce *v.* Maguire, 17 R. I. 61, 20 Atl. Rep. 98.

In Louisiana a defendant in attachment may release the crop by giving a bond for one half more than its value and need not bond the plantation also attached. Lallande *v.* Crandell, 38 La. Ann. 192.

3. Irvin *v.* Howard, 37 Ga. 18.

4. Forrest *v.* O'Donnell, 42 Mich. 556.

5. Johnson *v.* Weatherwax, 9 Kan. 75.

plevy bond) must be made payable to the plaintiff and not to the officer levying the writ, and if the bond is made payable to the officer, an attachment can not be maintained thereon in the plaintiff's name.[1] This seeming incongruity in the construction of the statutes having the same object in view, viz., the return of the property to the defendant, arises from the fact that in one state the sheriff is not relieved of his liability to the plaintiff for the production of the attached property, and in another he is.

No particular form of words is necessary to create a covenant in the bond for the return of the property, but any language importing an agreement and duty to perform such act is sufficient therefor.[2] Bonds which have been given to continue the possession of the attached property in the owner thereof will not be harshly construed according to their strict verbal meaning, but will be allowed the force given to them by the statute in such cases and by a fair and equitable consideration of the covenant.[3] When a statute requires a bond to be executed in a particular form, *and not otherwise*, no recovery can be had on a bond professedly taken under the authority of that act if it does not conform to it; but if the statute merely prescribes the form, without making any prohibition of any other, a bond which varies from it may yet be good at common law.[4] Under statutes which do not forbid the use of any form but the one prescribed by such statute, the bond, however informal, may be good at common law; for any obligation which is entered into voluntarily and for a valuable consideration is good if the parties are able to contract and the covenant is not repugnant to the letter or policy of the law.[5] Where such forthcoming

1. Agnew *v.* Leath, 63 Ala. 345.

2. Yocum *v.* Barnes, 8 B. Mon. (Ky.) 496.

3. Bell *v.* Western River, etc., Co., 3 Metc. (Ky.) 558.

4. Smith *v.* Fargo, 57 Cal. 157; Seawell *v.* Cohn, 2 Nev. 308.

5. Turner *v.* Armstrong, 9 Ill. App. 24; Munter *v.* Reese, 61 Ala. 395; Whitsett *v.* Womack, 8 Ala. 466; Colorado City Nat. Bank *v.* Lester, 73 Tex. 542; Sheppard *v.* Collins, 12 Ia. 570; United States *v.* Linn, 15 Peters (U. S.) 290; Hardesty *v.* Price, 3 Colo. 556.

Where a delinquent taxpayer gave a forthcoming bond and resumed possession of personal property that had been levied upon by a collector, and the bond was conditioned to abide the

bond contains a condition that is not required by the statute and yet is not illegal, it will be regarded as though it were not expressed in the bond.[1] When a forthcoming bond has been executed and the attachment released, the bond is binding as a common law obligation (unless forbidden by the statute) and can not be repudiated, although it be more onerous than the statutory undertakings.[2]

In general, a forthcoming bond must contain the principal covenant that the property (and sometimes "or its estimated value") shall be delivered to the sheriff to satisfy any judgment which may be obtained in favor of the plaintiff in the attachment suit and must be executed in the manner prescribed.[3] And under such a provision a bond conditioned that the attachment defendant "shall produce said goods in satisfaction of the judgment in said action, or pay such judgment as shall be rendered against them" is valid, although it is not in form in compliance with the statute law, and an action can be maintained upon it.[4] But when the statute prescribes that the bond shall be conditioned to perform the judgment of the court, a bond given to the sheriff by the defendant in whose custody the property is left, conditioned that he will return the same on demand to the sheriff, and containing no covenant to perform the judgment of the court, will not be sufficient.[5] And can not be enforced as a statutory bond.[6] And under a statute prescribing, that the bond shall be conditioned for the delivery to the sheriff of the attached property or its estimated value, a

decision of the county commissioners as to the legality of the assessment, it was held to be against public policy and void. Hardesty *v.* Price, 3 Colo. 556.

1. Purcell *v.* Steele, 12 Ill. 93.

2. Gardner *v.* Donnelly, 86 Cal. 367, 24 Pac. Rep. 1072.

3. As to the proper practice in Iowa, see Jennings *v.* Warnock, 37 Iowa 278.

4. Sheppard *v.* Collins, 12 Iowa 570.

5. Allerton *v.* Eldridge, 56 Iowa 709.

6. Lowenstein *v.* McCadden, 54 Ark. 13, 14 S. W. Rep. 1095.

A bond thus: (Court and title.) "We bind ourselves to the plaintiff W. E. in the sum of $85.00 that the defendant M. E. shall perform the judgment of the said magistrate in this action touching the attachment herein" was held to be an undertaking in effect, a statutory bond. Endress *v.* Ent, 18 Kan. 236.

bond, taken by the sheriff by virtue of his office and not *colore officii*, conditioned to deliver the property to the sheriff on demand or a money equivalent and indemnify him against all damages, will be sufficient though defective.[1] A bond conditioned that the attached property shall be delivered to the officer on demand or so much thereof as shall be necessary to satisfy any judgment which may be recovered, or to pay the appraised value of the property not exceeding the amount of the judgment and costs, was considered sufficient, for though not in strict conformity to the statute, it substantially complies with it.[2]

The bond must, however, be such a bond as is authorized by law, or the court can have no jurisdiction over its maker. For example where an action was begun on an account, and no bond or affidavit filed as required in suits of attachment, and no attachment was in fact issued, but the defendant had filed a bond of a third party with conditions running to the plaintiff that the defendant would perform the judgment that might be entered against him; it was held that as the bond was not authorized by law, no recovery could be had upon it.[3] It has been declared that no sheriff or other officer shall take any bond, obligation or security by "color of his office" in any other case or manner than such as are provided by law. Any such bond or obligation, if taken, will be void.[4] Furthermore, there is no lawful authority for taking a bond for the release of property attached when such attachment itself is unlawful; therefore, a bond given to release property from an illegal attachment creates no liability either as a statutory or common law obligation.[5]

To make a valid forthcoming bond there must be a recital of the names of all the parties in the suit. Even though one of the defendants be dead, yet if the forthcoming bond do not re-

1. Garretson *v.* Reeder, 23 Iowa 21.
2. Dunn *v.* Crocker, 22 Ind. 324.
3. Williams *v.* Skipwith, 34 Ark. 529.
4. Murtagh *v.* Conner, 15 Hun (N. Y.) 488.
5. Butler *v.* Coleman, 8 Sup. Ct. Rep. 718.

cite the names of all of the defendants to the attachment it will be quashed because of the variance.[1]

A mistake in the recital of a forthcoming bond as to what court the writ of attachment issued from, is of no consequence, for it is immaterial in what court the action is pending, and although the surties mistake the court in which the attachment suit was begun, the plaintiff should not be prejudiced by reason of such mistake.[2]

No consideration need be stated in the undertaking executed to secure the release of attached property. The release of the attached property is a sufficient consideration. Such an undertaking is a valid common law obligation for the payment of money,[3] and will be enforced when it does not offend the law or contravene public policy.[4]

The fact that the name of the obligee in a forthcoming bond has been misspelled, or so written as to make it doubtful who was the person intended, will not render such bond void, because in such a case it is competent to hear parol evidence on the subject.[5]

A paper can not be signed and sealed in blank with verbal authority to fill it up and thereby make a bond of it. When the same is afterwards done, such purported bond is void as to the parties signing and sealing it, unless he afterwards redeliver it or acknowledge and adopt it as his bond.[6]

1. Holt *v.* Lynch, 18 W. Va. 567.

In this case there were four parties defendant and the clerk indorsed on the writ that one of the parties had "departed this life," the bond taken thereon recited that it was against three, the number of living defendants. The bond was quashed. Holt *v.* Lynch, 18 W. Va. 567.

In this case the amount due was not correctly stated and it was held to be not a material variance. Holt *v.* Lynch, 18 W. Va. 567.

2. Ripley *v.* Gear, 58 Iowa 460.

In this case the writ was described as having issued from the circuit court, when as a matter of fact it issued from the district court, and such mistake was held to be immaterial and did not release the sureties.

3. Lightle *v.* Berning, 15 Nev. 389; Bildersee *v.* Aden, 62 Barb. (N. Y.) 175, 12 Abb. Pr. n. s. 324.

4. Munter *v.* Reese, 61 Ala. 395; Whitsett *v.* Womack, 8 Ala. 466.

5. Ambach *v.* Armstrong, 29 W. Va. 744, 3 S. E. Rep. 44.

6. Gilbert *v.* Anthony, 1 Yerger (Tenn.) 69; Wynne *v.* Governor, 1 Yerger (Tenn.) 149; Hill *v.* Scales, 7 Yerger (Tenn.) 409; Byers *v.* McClanahan, 6 Gill & J. (Md.) 250;

It seems that there is no statutory provision or rule of court made to compel defendants in attachment to substitute new sureties on the bond for the release of the property when the first sureties have become insolvent, and that the court has not the power to make such an order.[1] But in Georgia, when a garnishment has been dissolved by the principal defendants giving a bond, and it is thereafter made to appear that the surety is insolvent and the security insufficient to protect the plaintiff, a second writ of garnishment may issue.[2]

§ 288. **Effect of the bond.**—When the officer who has seized personal property on an attachment writ receives the bond which insures the safe keeping and faithful return of the property to him, if required, such officer must then deliver the property to the party giving such bond,[3] who will hold it as the bailee of the sheriff in most states; and in the states which consider him such a bailee, the property is still in contemplation of law in the possession of the officer in so far as to make the subsisting attachment a lien prior to subsequent attaching creditors. When the attached property is in the hands of such claimant under the bond for redelivery to the sheriff, the property is as free from the reach of other process as it would have been in the hands of the sheriff himself.[4] And a subsequent

Perminter *v.* M'Daniel, 1 Hill (S. C.) 267; Boyd *v.* Boyd, 2 Nott & M. (S. C.) 125; United States *v.* Nelson, 2 Brock. (U. S. 4th Cir.) 64; Ayres *v.* Harness, 1 Ohio 368; McKee *v.* Hicks, 2 Dev. (N. C.) L. 379. To the contrary, Wiley *v.* Moor, 17 Serg. & R. (Pa.) 438. See also Sigfried *v.* Levan, 6 Serg. & R. (Pa.) 308; Franklin Bank *v.* Bartlet, Wright (Ohio) 742.

1. Dudley *v.* Goodrich, 16 How. (N. Y.) Pr. 189.

But where the surety is not sufficient in the first instance (as where one is a minor) it seems that an additional surety may be ordered by the court. Jewett *v.* Crane, 35 Barb. (N. Y.) 208.

2. Stewart *v.* Dobbs, 39 Ga. 82.

3. But although the officer is required to surrender the chattels on a bond being given, he is not required, at least in Rhode Island, to return them to the place from whence he removed them. Clark *v.* Wilson, 14 R. I. 13.

4. Tyler *v.* Safford, 24 Kan. 580; Rives *v.* Wilborne, 6 Ala. 45; Cordaman *v.* Malone, 63 Ala. 556; Gass *v.* Williams, 46 Ind. 253; Hobson *v.* Hall, (Ky.) 14 S. W. Rep. 958; Roberts *v.* Dunn, 71 Ill. 46; Cole *v.* Smith, 83 Iowa 579, 50 N. W. Rep. 54; Gray *v.* Perkins, 20 Miss. (12 Sm. & M.) 622; Hilton *v.* Ross, 9 Neb. 406; Montague *v.* Gaddis, 37 Miss. 453; Evans *v.* King, 7 Mo. 411; Burch *v.* Watts, 37

sale of such articles by the debtor gives the vendee no right against the attaching creditor.[1] The power of the court over such property continues the same as if no bond had been given and the possession had never passed from officer.[2] In the bonds to *discharge the attachment*, the power of the court and the officer over the property is lost, and the plaintiff can look for indemnity only to the bond, as will be shown in the second part of this chapter.[3] One statute requires the bond to be conditioned that the defendant will, on demand, redeliver such attached property so released to the proper officer to be applied to the payment of the judgment, and that in default thereof the defendant and sureties will pay to the plaintiff the full value of the property so released, and states in another section that the property shall be released from the attachment and delivered upon the justification of the sureties in the undertaking.[4]

It seems that when live stock has been attached and the defendant files his delivery bond, with security, and it is accepted, he is entitled to the possession of such live stock, without payment of the charges theretofore incurred for keeping the stock during the pendency of the attachment.[5]

Much uncertainty exists as to what rights are waived by the attachment defendant when he gives a forthcoming bond for the release of property seized on attachment. And in the majority of instances it seems that by executing a forthcoming bond to the sheriff the defendant thereby acknowledges the validity and regularity of the attachment, and that he thereby waives his right to thereafter question it;[6] that he can not there-

Tex. 135; Drake *v.* Sworts, 24 Oregon 198, 33 Pac. Rep. 563; Schneider *v.* Wallingford, 4 Colo. App. 150, 34 Pac. Rep. 1109.

1. Woodman *v.* Trafton, 7 Me. (7 Greenl.) 178.

2. Bell *v.* Western River, etc., Co., 3 Metc. (Ky.) 558.

3. Bell *v.* Western River, etc., Co., 3 Metc. (Ky.) 558; and *post*, § ——.

4. Henry *v.* Gold Park Mining Co., 3 McCrary (U. S. D. C.) 390.

5. Milburn *v.* Marlow, 4 Greene (Iowa) 17.

6. Ferguson *v.* Glidewell, 48 Ark. 195; Dierolf *v.* Winterfield, 24 Wis. 143; Paine *v.* Snell, 3 Mo. 409; New Haven Lumber Co. *v.* Raymond, 76 Iowa 225, 40 N. W. Rep. 820; Huff *v.* Hutchinson, 14 How. 586; Pacific Nat. Bank *v.* Mixer, 124 U. S. 721; Wolf *v.* Cook, 40 Fed. Rep. 432; Barry *v.* Foyles, 1 Peters 311.

after traverse the grounds alleged in the affidavit of the attachment by plea in abatement;[1] or move to vacate the attachment on the ground that the property was not liable;[2] or move to quash or vacate the attachment generally,[3] unless the attachment-defendant was not a party to such bond, in which case it in no manner affects his right to move to quash the writ[4] and of the right to claim the time allowed for appearing and answering in cases of service by publication;[5] and of the objection that no proper inventory was taken of the attached property in a state where such inventory is required.[6] But in Missouri the attachment-defendant has the right, by plea, to traverse the ground on which it was issued, and to have it quashed if not issued on sufficient grounds.[7] Likewise in Ohio and Louisiana, the taking of possession of attached property upon a release bond is no waiver of the right to move to dissolve it at any time before judgment, nor an estoppel from offering evidence to disprove the charges on which attachment was obtained.[8] The owner, in whose possession the property is found when attached, when such owner is another than the defendant in the attachment suit, may contest the levy.[9]

Whenever the attachment lien is dissolved by the giving of a bond by the attachment-defendant, the giving of such bond, of course, waives all technicalities in regard to the making of the levy, since the same is then immaterial because of the attachment being dissolved.[10]

The giving of a forthcoming bond, in some instances, seems

1. Hill *v.* Harding, 93 Ill. 77.
2. Morrison *v.* Alphin, 23 Ark. 136.
3. Paddock *v.* Matthews, 3 Mich. 18.
4. Pierce *v.* Johnson, 93 Mich. 125, 53 N. W. Rep. 16; Rippon Knitting Works *v.* Johnson, 93 Mich. 129, 53 N. W. Rep. 17; Mack *v.* Johnson, 93 Mich. 129, 53 N. W. Rep. 17; Leonard *v.* Johnson, 93 Mich. 129, 53 N. W. Rep. 17.
5. Shields *v.* Barden, 6 Ark. 459.
6. McRae *v.* Austin, 9 La. Ann. 360.
7. Montague *v.* Gaddis, 37 Miss. 453.
8. Ross *v.* Miller, etc., Co., 7 Ohio Cir. Ct. Rep. 51; Avet *v.* Albo, 21 La. Ann. 349.
9. Schwein *v.* Sims, 2 Metc. (Ky.) 209; Halbert *v.* McCulloch, 3 Metc. (Ky.) 456; Hilton *v.* Ross, 9 Neb. 406; Petring *v.* Chrisler, 90 Mo. 649; Memphis Water Co. *v.* Magens, 15 Lea (Tenn.) 37.
10. See as to the "Effect of Dissolutiod of the Attachment," *post*, § 326.

to have the effect of a personal appearance in the suit. In Alabama, where such bond is a replevy bond, by the execution of it the defendant becomes a party to the suit and the bond is an admission of notice of the levy and of the suit, and if it be executed the certain number of days before the commencement of the term required for appearances, the court is authorized to proceed to trial.[1] And such appearance is there, as well as in Mississippi, sufficient to sustain a judgment by default.[2] And in Missouri and Pennsylvania, after the giving of the forthcoming bond, the cause stands as though it had been commenced by an ordinary summons.[3] It is thereafter an action in *personam* and the judgment will be a general one.[4] The question seems not to have been decided in other states; but where the bond is not for the return of the property, but for the performance of the judgment, and is executed by the defendant as principal, it is, as a matter of course, equivalent to a personal appearance in the suit.[5]

Whether or not the giving of a forthcoming bond and the taking of possession of the attached property by a stranger to the attachment suit, when he is permitted so to do, connects him in any way with the suit, and what such connection is, are questions that seem to have been given no one definite answer, although it has been said in Alabama that he holds for the defendant, and that his bond is subject to the same rules as if made by the defendant himself; and he is entitled to make all the defenses which the defendant could have made if he had been sued,[6] and, further, that he so far connects himself with the attachment suit that he must take notice of the judgment entered therein, and that while retaining the goods under the bond, he can not dispute or deny the title to the defendant;

1. Peebles *v.* Weir, 60 Ala. 413.

2. Chastain *v.* Armstrong, 85 Ala. 215; Wilkinson *v.* Patterson, 6 How. (Miss.) 193; Richard *v.* Mooney, 39 Miss. 357.

3. Payne *v.* Snell, 3 Mo. 409.

4. Bremner, Trucks & Co. *v.* Moyer, 98 Pa. St. 274; Blyler *v.* Kline, 64 Pa. St. 130.

5. See further, *post*, § 304.

6. Rhodes *v.* Smith, 66 Ala. 174; Kirk *v.* Morris, 40 Ala. 225; Morris *v.* Hall, 41 Ala. 510.

As to the rule in Kansas see Bowden *v.* Burnham, 59 Fed. Rep. 752, 8 Cir. Ct. App. 248; Barnes *v.* Burnham, 59 Fed. Rep. 752, 8 Cir. Ct. App. 248.

and if the title reside in him and the defendant be without an attachable interest therein, his title does not excuse him from the performances of the condition of his bond. He must first redeliver the goods, in compliance with his covenant in the bond, to answer the levy of the writ, and then he may afterwards interpose a claim of the property.[1] But the law regarding the rights of third persons, who are usually called interveners, and who claim the attached property, will receive further consideration hereinafter.[2]

§ 289. **Return of the bond.**—It has been said that it is the duty of the officer who takes a bond for the return of the property and delivers it to the defendant, to return such bond with the other papers in the cause.[3] But a failure to return it does not *per se* make the sheriff liable for the value of the property levied on.[4]

Where the conditions of the bond are not complied with and the bond is therefor forfeited, it is the duty of the officer to make a return that such bond is forfeited, but it seems that he may as well do this on the execution as upon the bond itself,[5] although it has been said in one case in Alabama that the sheriff is not required to return the bond "forfeited," and that the obligee may maintain an action thereon without showing such a return.[6]

§ 290. **Compliance with the covenant to return.**—The conditions of a forthcoming or delivery bond contemplates the return of the property, not only for the benefit of the attaching creditor, but also for the benefit of the securities named in the bond, who are liable unless such return is made.[7] The covenant in the bond to return requires an actual redelivery of the property attached to the officer who made such attachment; or by an offer to deliver, which offer can only be by bringing forward, pointing out and tendering the property to the

1. Rhodes *v.* Smith, 66 Ala. 174; Braley *v.* Clark, 22 Ala. 361.
2. See *post*, § 426.
3. Rhodes *v.* Smith, 66 Ala. 174.
4. Mason *v.* Watts, 7 Ala. 703.
5. Jones *v.* Miss. & Ala. R. R. Co., 5 How. (Miss.) 407.
6. Falls *v.* Weissinger, 11 Ala. 801.
7. McRae *v.* McClean, 3 Porter (Ala.) 138.

officer.[1] The statement of a desire to redeliver the goods to the officer is not such a tender as will justify the covenant to return. As for example, telling the sheriff upon the street that the claimant wanted to deliver up the attached property, which consisted of a stock of goods, then in the possession of a third person under a conveyance from the claimant and others, did not alone constitute a delivery to the sheriff.[2] A delivery of a part only of the property does not discharge any part of the penalty, and if the condition of the bond be broken, the whole of the penalty may be recovered, provided the obligee is injured to that extent.[3] The acceptance by the officer of a return of a part of the property is no new undertaking on his part.[4]

The property returned must be the identical property that was received from the officer, or there is no compliance with the terms of the bond. For example, a stock of groceries was attached and surrendered on a forthcoming bond. Some were sold and others of a perishable nature perished. All of the goods were replaced by others of the same kind. In an action on the bond it was held that the attached goods could not be substituted, and therefore that the bondsmen were liable for the whole stock, including the goods which perished.[5] However, the creditor may consent to such a substitution, and thereby release the sureties to the extent of the value thereof.[6]

Where the forthcoming or delivery bond contains two con-

1. Chapline *v.* Robertson, 44 Ark. 202; Pogue *v.* Joyner, 7 Ark. 462; Cooper *v.* Peck, 22 Ala. 406.

If, instead of making such a tender of the property, the property itself is withheld from the sheriff and a bond tendered to him to try the right of the property in possession, the sheriff is justified in returning the bond "forfeited." Cooper *v.* Peck, 22 Ala. 406.

2. Garrity *v.* Thompson, 67 Tex. 1, 2 S. W. Rep. 750.

3. Bland *v.* Creager, 13 B. Mon. (Ky.) 509; Metrovich *v.* Jovovich, 58 Cal. 341.

In an action for a breach of such undertaking, it was shown that a portion of the attached property was levied upon and sold by the sheriff under an execution. The court then held that the measure of damages was the full value of the property attached, less the proceeds of the sale. Metrovich *v.* Jovovich, 58 Cal. 341.

4. Brumby *v.* Barnard, 60 Ga. 292.

5. Pearce *v.* Maguire, 17 R. I. 61, 20 Atl. Rep. 98.

6. Milligan *v.* Vallee, 31 La. Ann. 375. See *post*, § 291.

ditions, or rather, a condition to perform one of two acts, the performance of either will be a compliance with the requirement of the bond.[1]

§ 291. **When liability of the surety on the bond begins.**— The sureties on a bond given for the forthcoming of the property to satisfy the judgment which may be entered against the defendant become liable from the moment the defendant fails to return the released property to the officer, when the latter, on proper legal process, makes a demand upon him.[2] And where the bond is conditioned that the defendant will appear to answer the plaintiff's demand and pay such judgment as shall be rendered, etc., the liability of the sureties to such bond attaches on the rendering of judgment, and without the issuing of an execution.[3] Until a verdict is rendered for the plaintiff in the attachment suit the sureties on the bond are in no danger of judgment against them; their contract is only for a delivery of the property, or the payment of its value, or the payment of the judgment, as the case may be.[4] Where the statute provides that if an execution, issued upon the judgment obtained against the defendant, be returned unsatisfied, then the plaintiff may prosecute the undertaking, the liability of the sureties on an undertaking for the release of the property does not accrue until the return of the execution unsatisfied in the attachment suit.[5]

The sureties on a bond against several defendants become liable when judgment is rendered against one of them.[6] Where a bond is executed for the release of attached property by three persons as principals, and the bond is signed but by one of the principals, and by a surety, the liability of the surety can only be fixed by proof sufficient to destroy the presumption that he

1. Reagan *v.* Kitchen, 3 Martin (La.) 418.

2. Stewart *v.* Lacoume, 30 La. Ann. Part I, 157.

3. Lincoln *v.* Beebe, 11 Ark. 697.

4. Atkinson *v.* Foxworth, 53 Miss. 733.

Hence they can not interpose any defense in the attachment suit, for the action is not against them. Atkinson *v.* Foxworth, 53 Miss. 733.

5. Brownlee *v.* Riffenburg, 95 Cal. 447, 30 Pac. Rep. 587.

6. McCutcheon *v.* Weston, 65 Cal. 37.

expected all the principals to be bound as such, or by proof to show that he would have recourse against them if he paid it.[1] And where a forthcoming bond has been signed by one surety and delivered to the principal as an escrow until signed by another surety, no liability can arise as against the surety who signed, unless the bond is signed by the other surety also.[2]

The liability of the sureties on a bond given for the return of attached property accrues at the time of the forfeiture of such bond. Therefore in a case where a bond was given for the redelivery of a slave, and the slave died, after forfeiture of such bond, but before the commencement of an action upon such bond, it was held that such death afforded no bar to the plaintiff's right of action.[3]

Where a surety signs a bond conditioned that the defendant will return the property or perform the judgment which may be entered against him, such surety will become liable, unless one of the acts be performed, even though the performance of the other be rendered impossible.[4] For example, the accidental destruction by fire of the property named in such a delivery bond will not excuse the performance of the other condition.[5] In another case one person brought an attachment against another and a levy was made upon a stallion. A third person claiming the horse got possession of it by giving a bond with surety that he would perform the judgment of the court or produce the horse on the order of the court. Judgment was rendered against the pretended title of the third party, who, with sureties, were held liable on their bond, notwithstanding the fact that the horse had died before judgment.[6]

The sureties on a delivery bond having become liable in the alternative to perform the judgment, are bound, notwithstanding the goods may be lost or destroyed.[7]

1. Clements *v.* Cassilly, 4 La. Ann. 380.
2. Sessions *v.* Jones, 6 How. (Miss.) 123.
3. Falls *v.* Weissinger, 11 Ala. 801.
4. Goebel *v.* Stevenson, 35 Mich. 172.
5. Doggett, Bassett & Hill Co. *v.* Black, 40 Fed. Rep. 439.
6. Dear *v.* Brannon, 4 Bush (Ky.) 471.
7. Irvin *v.* Howard, 37 Ga. 18.

If several attachments are brought by different creditors against the same goods and the defendant dissolves the attachment by giving a bond for the return of them or their value, and judgment is obtained by one of the creditors, the defendant will be compelled to comply with the conditions of his bond.[1]

A failure to deliver a part of attached property taken on the giving of a forthcoming bond is a forfeiture of the bond, but when, by special statute, the return of such bond forfeited has the effect of a judgment and authorizes the issuance of an execution thereon for the amount of the recovery in the attachment suit, and if the failure to deliver such portion is occasioned by the act of the plaintiff, the statute will cease to apply, and the obligors by making default in delivering the residue can only be held liable for its value as at common law.[2]

If the judgment entered against the attachment defendant be merely a personal one, it will fully quash the attachment and release the property. No recovery can then be had against the surety on the bond given for the release of the attached property.[3]

A bond given for the release of property, conditioned that the obligors shall pay to the attaching creditor such judgment as shall be rendered in his favor against them, will bind them to pay when a judgment is recovered *in his favor*, though not in form against them.[4]

§ 292. **When the liability of the surety on the bond is discharged.**—When the condition of the bond for the forthcoming of attached property has been fulfilled; that is to say when the property has been surrendered in the condition in which it was received; the sureties to a forthcoming bond are, as a matter of course, discharged from further liability.[5] When the

1. Hanness *v.* Bonnell, 23 N. J. L. (3 Zab.) 159.

2. Dunlap *v.* Clements, 18 Ala. 778.

3. Wasson *v.* Cone, 86 Ill. 46; Nalle *v.* Baird, 30 La. Ann., Part II, 1148; Rathbone *v.* Ship London, 6 La. Ann. 439.

4. Hunter *v.* McCraw, 32 Ala. 518. See further as to the "Liability of Sureties on a Bond to Pay the Judgment," *post*, § 307.

5. Meyer *v.* Fletcher, 35 La. Ann. 878.

bond is condition to perform one of two acts, the performance of either will discharge all the parties to it.[1]

The law, pertaining to sureties on a forthcoming bond, is governed by the same rules that apply to sureties in other cases. They are only bound to the extent of their obligation and stand upon the very terms of their contract, consequently if the terms be changed without their consent they are released from liability.[2] An agreement by the creditor with his principal debtor for an extension of the time for payment will discharge the surety.[3] And where the sheriff, directed by the plaintiff, puts off the sale of property taken on execution to a after the return day, and suffers it to remain in the possession of the principal defendant, the sureties are released if such direction be given without their concurrence.[4]

A change in the extent of the obligation, as by the taking of a new surety by the officer, may release the obligors on a bond; for example, the plaintiff sued out an attachment and levied upon his debtor's property, which was in possession of persons claiming it under a prior sale. The claimants executed a replevy bond on the same day and the sheriff returned the property to them. On the next day the claimants made the required affidavit and executed a claim, which was approved and accepted by the sheriff. It was held that the approval of the claim bond annulled the replevy bond.[5]

Likewise the correction of a clerical error, without the knowledge of the surety on a forthcoming bond, when by such correction a change is made in the obligation of the surety, will discharge him; as where, by a clerical error, a writ of attachment was made returnable on the 29th of September, in which month there was no term of court. The 29th of August being the date intended and a bond reciting that the writ was returnable "the 29th inst.," and afterwards by consent of all the parties except the sureties the writ was ordered to be made return-

1. Reagan *v.* Kitchen, 3 Martin (La.) 418.
2. Quillen *v.* Arnold, 12 Nev. 234.
3. Harbert *v.* Dumont, 3 Ind. 346.
4. Bullitt *v.* Winston, 1 Munf. (Va.) 269.
5. Roswald *v.* Hobbie, 85 Ala. 73, 4 So. Rep. 177.

able September 5th and was entered on that day, the sureties were discharged from the liability on the bond.[1]

The amendment of the attaching creditor's declaration, when the same increases the liability of the defendant and his sureties, may work a discharge of such sureties, who have given bond for the performance of the judgment to be obtained therein, if done without notice to them and without their knowledge or consent.[2] But the amendment of one count of a declaration does not discharge the sureties from liability for the sum sued for in the other counts originally inserted in the writ and not affected by the amendment.[3] But where, after a plea in abatement, a summons was amended by the stipulation of the parties, although without the consent of the sureties, it was said to be not a new action, but a continuance of the old one, holding the sureties still liable on a forthcoming bond theretofore given.[4]

There is a diversity of opinion as to whether the discharge of one of several defendants in the attachment is such a change of the condition as to discharge the sureties on a bond given for the release of attached property. It is said in Massachusetts that the result, so far as the sureties are concerned, is the same whether the plaintiff discontinues as to one of the defendants or fails to recover against him on the trial. No change is made in the nature of the claim which is the subject of the suit, and no greater or different liability is cast upon the sureties by the discontinuance.[5] And the same principle is maintained in Wisconsin.[6] But in Michigan, the principal executed a bond with sureties to the sheriff to prevent his removing certain property which had been seized under a writ of attachment, running against A, B and C. When the attachment suit was tried the plaintiff discontinued as to A and B, and procured a judgment for the whole amount in controversy

1. Simeon *v.* Cramm, 121 Mass. 492. And this applies likewise to bonds to dissolve the attachment. See *post*, § 306.

2. Prince *v.* Clark, 127 Mass. 599.

3. Warren *v.* Lord, 131 Mass. 560; Seeley *v.* Brown, 14 Pick. (Mass.) 177; Knight *v.* Dorr, 19 Pick. (Mass.) 48.

4. Christal *v.* Kelly, 88 N. Y. 285.

5. Poole *v.* Dyer, 123 Mass. 363; Sanderson *v.* Stevens, 116 Mass. 133.

6. Sutro *v.* Bigelow, 31 Wis. 527.

against C. A suit was brought on the bond and the court held that by discontinuing the attachment as to two of the defendants, the sureties were discharged from liability.[1]

Whether or not the adding of a party defendant effects such a change in the liability on the bond as to discharge a surety thereon, is likewise uncertain. In Massachusetts where the plaintiff discontinued as to one defendant, although he was not a party to the bond, and summoned a new defendant without notice to the surety, the bond was thereby discharged.[2] But in New York when the defendant brought in was a *partner* of the defendants in the original suit, although brought in after the bond was given, it was held that the surety was not thereby discharged.[3]

The dissolution of the attachment, however, as a matter of course, works a discharge of the sureties to the forthcoming bond, for then all the proceedings in the attachment are quashed.[4]

Where a levy on execution is abandoned and the principal debtor released, the sureties are discharged, if such abandonment was made without their consent.[5] If, subsequent to the giving of the forthcoming bond, an execution be issued against the attaching creditor in favor of a third party, and the creditor gives his consent that the execution be levied upon the attached property, which is done, and the property is sold under such execution, the sureties on the forthcoming bond are discharged.[6] In a case where the plaintiff, after having obtained judgment, released his lien upon part of the attached property in order that the defendant, who had a good opportunity to sell, should pay the plaintiff the purchase-money, it was held that such a release of part of the property, without the sureties' knowledge or consent, discharged such sureties *pro tanto*, be-

1. Andre *v.* Fitzhugh, 18 Mich. 93.
2. Richards *v.* Storer, 114 Mass. 101; Tucker *v.* White, 5 Allen (Mass.) 322.
3. Christal *v.* Kelly, 24 Hun (N. Y.) 155; Higgins *v.* Healy, 47 N. Y. Supr. Ct. (15 J. & S.) 207.
4. Gass *v.* Williams, 46 Ind. 253; Wilson *v.* Churchman, 4 La. Ann. 452.
5. Sherraden *v.* Parker, 24 Iowa, 28.
6. Jaeger *v.* Stoelting, 30 Ind. 341.

cause he was thereby deprived of the benefits of that amount of the security held by him.[1]

The payment of the judgment obtained in the attachment suit is, of course, a discharge of the sureties on the bond for the release of property in such attachment case.[2] But the satisfaction of an execution issued on the judgment obtained in the attachment suit is not, of necessity, a satisfaction of the judgment and a discharge of the sureties on the forthcoming bond, because the creditor may be able to show that the satisfaction was acknowledged by mistake.[3]

A proper tender of the amount sufficient to satisfy the judgment obtained in the attachment suit, made by a surety on the undertaking, and a refusal by the obligee to accept such amount due, effects a complete discharge of such surety from all obligation on the undertaking, because a refusal to take the money when tendered may obstruct the surety in his remedy against the principal.[4] And sureties on an undertaking under seal in the common-law form, are discharged if the defendant in the attachment suit tenders to the plaintiff the amount of his demand and costs. It is not necessary that such tender be paid into the court, and such tender is sufficient though not kept good.[5] Likewise where the principal in a forthcoming bond offers to deliver the property to the officer, who thereupon waives an actual delivery and stipulates that the obligor shall

1. Bedwell *v.* Gebhart, 67 Iowa 44.

The release of real estate from the the lien of the judgment or the discharge of a levy whereby a lien on property has been created will have this effect. Bedwell *v.* Gebhart, 67 Iowa 44.

2. Boyd *v.* Buckingham, 10 Humph. (Tenn.) 434; Chrisman *v.* Jones, 34 Ark. 73.

3. Canfield *v.* Miller, 13 Gray, (Mass.) 274. See also Wood *v.* Mann, 125 Mass. 319.

Where one of two sureties pays the judgment, he is entitled to complete exoneration, and is entitled to contribution from his cosurety, but he must also make his principal a party to his bill for contribution, or show why it would be fruitless to do so. Chrisman *v.* Jones, 34 Ark. 73.

4. Hayes *v.* Josephi, 26 Cal. 535.

5. Curiac *v.* Packard, 29 Cal. 194.

The same principle applies to the release of sureties on a forthcoming bond in this regard as to sureties on a bond to dissolve the attachment. Curiac *v.* Packard, 29 Cal. 194; and see *post*, § 306.

hold it for him, the sureties on the bond are thereby released from liability.[1]

Where a surety on the bond requests the creditor to proceed to collect the money from the principal, who is then solvent, and the creditor neglects or refuses to proceed, and the principal afterwards becomes insolvent and unable to pay, the surety will be discharged.[2]

When no judgment is rendered in the *attachment* suit for the sale of the attached property, the sureties on the forthcoming bond are discharged, because the rendition of a personal judgment alone is equivalent to the dismissal of the attachment proceedings.[3] And where sureties on a delivery bond have surrendered their indemnity upon the faith of a personal judgment, which operates to dissolve the attachment, they can not be made liable thereon by the entry of a judgment *nunc pro tunc* for the sale of the attached property.[4]

Whenever proceedings under a statute to discharge the liability of insolvent debtors work a dissolution of the attachment theretofore begun, such insolvency or bankruptcy proceedings work a discharge of the liability of the sureties on a forthcoming bond given in such attachment proceedings.[5]

Where the property, by operation of law, has ceased to reside in the attachment defendant, the sureties on a forthcoming bond are released from their liability thereon.[6]

1. Hansford *v.* Perrin, 6 B. Mon. (Ky.) 595.

2. Huffman *v.* Hulbert, 13 Wend. (N. Y.) 375.

3. Smith *v.* Scott, 86 Ind. 346. Compare, Waynant *v.* Dodson, 12 Iowa 22; Guay *v.* Andrews, 8 La. Ann. 141.

4. Wright *v.* Manns, 111 Ind. 422, 12 N. E. Rep. 160.

5. Kaiser *v.* Richardson, 5 Daly (N. Y.) 301.

In the following cases the sureties were not so discharged—McCombs *v.* Allen, 18 Hun (N. Y.) 190, 82 N. Y. 114; Zallar *v.* Janvrin, 49 N. H. 114. Coleman *v.* Bean, 3 Keyes (N. Y. Ct. of Appeals) 94; Bildersee *v.* Aden, 62 Barb. (N. Y.) 175, 12 Abb. Pr. (N. Y.) n. s. 324; Carpenter *v.* Turrell, 100 Mass. 450; Holyoke *v.* Adams, 1 Hun (N. Y.) 223; McCombs *v.* Allen, 82 N. Y. 114; New England, etc., Co. *v.* Parker, 10 Gray (Mass.) 333. Neither the letter nor the policy of the statute (bankruptcy) is infringed by holding defendants liable under their undertaking. Wolf *v.* Stix, 99 U. S. 1; Cutter *v.* Evans, 115 Mass. 27; Braley *v.* Booner, 116 Mass. 527; Holyoke *v.* Adams, 59 N. Y. 233; Goodhue *v.* King, 55 Cal. 377.

6. Green *v.* Lanier, 5 Heisk. (Tenn.) 662.

Where property has been released on a forthcoming bond, and thereafter, pending the original attachment suit and after use by the defendant, the property is under order of court sold because of its perishable nature, the sureties on the forthcoming bond are not liable for any difference between the amount realized by the sale and value of the property as stipulated in the bond.[1] Where the property held under attachment has been released on the bond, the sureties on such bond can not be held in an action thereon for any balance of the attachment plaintiff's judgment which may remain unsatisfied in a case where property has been sold or destroyed by use, and other property of greater value has been accepted by the creditor and appropriated to the satisfaction of his judgment.[2] The receiving of other property in lieu of the property attached in a case like this is not in contradiction to the principle hereinbefore laid down[3] that the identical property must be returned, for in this case the creditor saw fit to accept the substituted property and apply it to the satisfaction of his judgment.

If a surety on a forthcoming bond has been, by misrepresentations of the officer, induced to sign the bond before the levy of attachment was made, he is not liable on such bond.[4]

§ 293. **Rights of sureties on forthcoming bond.**—While it is not within the scope of this work to treat of the rights of sureties on bonds, their rights being similar to sureties on other bonds as pointed out in works on "suretyship," yet it may be well enough to say that where the attached property has been delivered to their owner because of his having given a forthcoming bond, and the same property has afterwards been taken on an execution in a subsequent suit, the sureties on the forthcoming bond can not sustain an action of replevin against the officer who levied the execution,[5] and that if one

1. Richards *v.* Craig, 8 Baxter (Tenn.) 457.

2. Milligan *v.* Vallee, 31 La. Ann. 375.

3. See *ante*, § 290.

4. Connell *v.* Scott, 5 Baxter (Tenn.) 595.

5. Stevenson *v.* Palmer, 14 Colo. 565, 24 Pac. Rep. 5.

Such action must be brought by the owner.

surety on such a bond pay the judgment rendered against the attachment debtor, he is entitled to an action for contribution from his cosurety on the release bond, when they are together liable for the payment of such judgment,[1] but he must make his principal a party to his bill for contribution or show cause why it would be fruitless to do so.[2]

§ 294. **Action on a delivery bond—(a) When it accrues.**—The right of action of a judgment creditor in attachment against the surety on a delivery bond will be construed in subordination to what is found to be the general intent of the parties.[3] An action will not lie on a forthcoming bond until a final disposition of the case in which it was taken and the party has been remitted to his remedy on the bond.[4] But in Iowa it is not necessary that the judgment against the debtor should recite that the attachment is sustained, in order that the liability of the sureties on a delivery bond be fixed thereby.[5] The officer has no right of action on a forthcoming bond until he has been held liable to an execution creditor for the value of the goods.[6] Where, however, the condition of the bond is, according to the statute, that the defendant will appear and answer the plaintiff's demand and pay such judgment as shall be rendered, etc., the liability of the securities on such bond accrues on the rendition of the judgment, and they may be sued without the issue of an execution.[7]

When, however, property in the hands of a third person has been attached and a bond given for its delivery "when and

1. Lebeaume *v.* Sweeney, 17 Mo. 153.

2. Chrisman *v.* Jones, 34 Ark. 73.

3. Owen *v.* Homan, 3 Eng. L. & Eq. 112.

4. Hansford *v.* Perrin, 6 B. Mon. (Ky.) 595.

5. New Haven Lumber Co. *v.* Raymond, 76 Iowa 225, 40 N. W. Rep. 820.

6. Staats *v.* Herbert, 4 Del. Ch. 508.

7. Lincoln *v.* Beebe, 11 Ark. 697; Weed *v.* Dills, 34 Mo. 483.

If it be shown by the sheriff's return that he could not find the principal, nor any other property of his, after diligent search and inquiry, and that plaintiff's counsel upon inquiry could not give any information on either subject, recourse may be had upon the surety. McCloskey, etc., Co. *v.* Wingfield, 32 La. Ann. 38.

If one of the principals on the bond be dead, his succession need not be pursued before moving against the surety. McCloskey, etc., Co., *v.* Wingfield, 32 La. Ann. 38.

where the court shall direct," according to a statute, the judgment of the court against the attachment defendant and execution issued thereon are not sufficient to render the obligors liable on the bond. There must be an order of the court for the delivery of the property in such case to render the obligors liable on the bond.[1]

A demand on a forthcoming bond for the return of attached property is generally a prerequisite to the bringing of an action on such bond, and where the same is necessary the officer is the right person to make the demand; but where the sureties have, by their own acts, made such demand useless, they are not released from their liability because no demand is made. The law does not require a demand in such cases.[2] If the bond, on which attached property was released, be conditioned that "defendant will, on demand, deliver such attached property, so released, to the proper officer," and the plaintiff has recovered a judgment in his attachment suit and thereafter makes a demand upon the defendant for the return of the property, an action will lie on the undertaking without demand being made by sheriff.[3] Where a legal demand is made upon the person in possession of the attached property holding under a forthcoming bond, and he refuses to deliver the property, it is a forfeiture of the bond and constitutes a cause of action thereon.[4] Where the delivery bond given by the attachment defendant specifies a time and place for the delivery of the property which is the subject of the bond, the sheriff need not make any demand at such time and place as a prerequisite to

1. Bortherton *v.* Thomson, 11 Mo. 94.

2. Driggs *v.* Harrington, 2 Mont. T. 30.

A joint and several bond having been given to dissolve an attachment of personal property conditioned to deliver up the property "within 30 days after the time of rendition of judgment in the action, free from expense to the plaintiff on a demand after the rendition of judgment," it was held that the obligors were not required to deliver the property 30 days after judgment without demand, and that the obligee, in order to support an action on the bond, must prove a demand upon one of them and his refusal. Smith *v.* Jewell, 14 Gray (Mass.) 222.

3. Brownlee *v.* Riffenburg, 95 Cal. 447, 30 Pac. Rep. 587.

4. Stinson *v.* Hall, 54 Ga. 676.

an action on the bond. But where he desires a return of the property before the day agreed upon, a demand is necessary.[1]

Where a third party has intervened and claimed the attached goods (as being the vendor having the right of stoppage *in transitu*) on intervention, he and his sureties will be bound to satisfy any judgment that may be obtained against the defendant, notwithstanding his bond may not have been made in conformity to law; and a return of the execution *nulla bona* issued against the attachment defendant is sufficient to render the surety upon such intervener's release bond liable.[2]

§ 295. (b) **Necessity of fi. fa. or "rule to show cause."**— Although the bond be forfeited, no judgment can be entered upon it in the main case unless there is a special provision made by the statute. There must be an action upon the bond.[3] And under some statutes permitting judgment in the main case to be entered against the surety on the bond for the forthcoming of attached property, it is held he ought to be made to respond to a rule upon him to show cause why he should not pay the judgment.[4] And that such judgment will not be entered against him on mere motion, or on trial of the main case.[5] In Louisana it is said that in the case of bonds of this nature the creditor can not ask judgment by rule against the surety without a "fi. fa.," or at least, a putting in default of, the principal.[6] However, in Texas, under a statute providing that where the plaintiff recovers judgment in such attachment, judgment shall be entered against the defendant and his sureties on the replevin bond, an action was brought on a verified account; the defendant was served with process; he replevied the property but did not appear, and the court held that it was proper that judgment on the account should be entered against the defendant and sureties on the replevin bond, without further evidence in proof of the account or fore-

1. Hunter *v.* Brown, 68 Ind. 225.
2. Emanuel *v.* Mann, 14 La. Ann. 53.
3. Clary *v.* Haines, 61 Ga. 520.
4. Moon *v.* Story, 2 B. Mon. (Ky.) 354; Hansford *v.* Perrin, 6 B. Mon. (Ky.) 595.
5. Clary *v.* Haines, 61 Va. 520.
6. Goodman *v.* Allen, 6 La. Ann. 371.

closure of the attachment lien.[1] The recovery of judgment in these cases is a similar proceeding to that upon "bond for the payment of the judgment" in the attachment.[2]

§ 296. (c) **Where the action shall be brought.**—It is said in Louisiana that where one is in possession of attached property under a forthcoming bond in one court he can not be sued in another court for its possession, nor can any other court inquire collaterally into the validity of the bond.[3] In Kentucky where an attachment was maintained in a chancery court, and the possession of the property retained on the giving of a forthcoming bond, and decree obtained against the attachment debtor, it was said that the chancellor might require, by rule and attachment, that the obligors in the bond produce the property, or decree against them the payment of its value; or that he might remit the plaintiff to his remedy at law on the bond.[4]

In Wisconsin where the marshal of the district attached property at the suit of creditors in New York, and then surrendered possession of it upon the execution of a bond to himself, for the use of those creditors, it was said to be within the jurisdiction of the district court of the United States for Wisconsin, to entertain a suit upon the bond begun by such marshal in behalf of the New York creditors against the claimants in Wisconsin, although both parties reside in the state of New York.[5]

§ 297. (d) **Parties to the action.**—The various state statutes permitting actions to be brought in the name of the party in interest will, of course, have to do in determining who is the proper party plaintiff in an action on a forthcoming bond. And these statutes must be considered in connection with what is hereinafter said. In Michigan, where the delivery bond is required to run to the sheriff himself, who holds it in trust, it is

1. Vogt *v.* Dorsey, 85 Tex. 90, 19 S. W. Rep. 1033.
2. See *post*, § 307–9.
3. Tucker *v.* Musselman, 6 La. Ann. 226.
4. Hansford *v.* Perrin, 6 B. Mon. (Ky.) 595.
5 Huff *v.* Hutchinson, 14 How. (U. S.) 586.

said that the attachment plaintiff has no right to sue on it or to transfer it before failure of execution and then only in the name of the sheriff, unless the sheriff has assigned the bond to him.[1] But the plaintiff may require such assignment as a matter of right.[2] In Alabama, likewise, the bond is properly made payable to the sheriff, but when assigned to the plaintiff he may sue on it.[3] And also in Missouri, where the property taken upon the giving of a forthcoming bond to the officer is not produced in compliance with the judgment and order of the court, the plaintiff can not begin an action on the bond, either by motion or suit, until the same has been duly assigned to him.[4] In Illinois also, such bond may be assigned to the plaintiff.[5] And where a sheriff does not assign the same to the plaintiff in the attachment, by the practice in that state, a suit thereon may be brought in the name of the sheriff "for the use" of such plaintiff.[6] Furthermore, where a creditor has procured a void attachment to issue because no sufficient bond had been given, and a stranger claimed the property and executed the forthcoming bond, the plaintiff, being a trespasser in taking the property, can not maintain an action on such bond.[7]

In Louisiana it has been said that a bond, containing distinct obligations to perform different things in favor of two different persons, gives each obligee a distinct and separate remedy, but that where one plaintiff proceeds against the sureties before any decision on the claim of the other, he could only recover one-half the amount of the bond, reserving his right to recover the balance in case the plaintiff in the other action can be defeated.[8]

Under an Ohio statute and also under an Indiana statute, where the bond was given for the possession and delivery of

1. Forrest *v.* O'Donnell, 42 Mich. 556; Wilson *v.* Donnelly, (R. I.) 31 Atl. Rep. 966.
2. Dorr *v.* Clark, 7 Mich. 310.
3. Adkins *v.* Allen, 1 Stew. (Ala.) 310.
4. McDowell *v.* Morgan, 33 Mo. 555.
5. Carpenter *v.* Hoyt, 17 Ill. 529.
6. Young *v.* Campbell, 10 Ill. (5 Gilman) 80.
7. Homan *v.* Brinckerhoff, 1 Denio. (N. Y.) 184.
8. Irish *v.* Wright, 12 Rob. (La.) 563.

attached property, to the sheriff, it enured to the benefit of all the creditors who attached during the pendency of that suit, while the goods were constructively in the hands of the sheriff, and who were afterwards adjudged entitled to participate in the proceeds. Each attaching creditor acquired an interest in such bond for the satisfaction of his judgment and all of the attaching creditors were properly joined as plaintiffs in a suit on such bond.[1]

In Kentucky in an attachment in chancery the chancellor may proceed by attachment against the obligors in a forthcoming bond; but not against the surety alone, when the principal is within the jurisdiction of the court.[2] In Arkansas if an attachment has been discharged by the defendant having executed the required bond, and he thereafter appeals with *supersedeas* from a judgment rendered against him in the cause, and judgment is then rendered against him and the sureties on his appeal bond ,in the Appellate Court, the plaintiff can then elect to proceed either by execution under the judgment against the defendant and sureties on the appeal bond, or he may sue the sureties on the bond given to discharge the attachment.[3]

§ 298. (e) **Plaintiff's pleading in action.**—When an action is brought upon the bond given for the return of the attached property, it is not necessary that the proceedings in attachment be fully set out or made a part of the declaration; for the attachment proceedings are not the foundation of an action on the bond. But the declaration or complaint must fully set out the undertaking and show that a case arose in which it was properly taken.[4] And in a suit on a bond conditioned for the delivery of the property or the satisfaction of the judgment which may be obtained in the attachment, if there is no alle-

1. Rutledge *v.* Corbin, 10 Ohio St. 478; Moore *v.* Jackson, 35 Ind. 360.

If they refuse to join, they should be made defendants and the reason stated in the complaint. Moore *v.* Jackson, 35 Ind. 360.

2. Page *v.* Long. 4 B. Mon. (Ky.) 121.

3. Chrisman *v.* Rogers, 30 Ark. 351. See further as to "Action on a Bond given to Dissolve an Attachment," *post*, § 307-9.

4. Dunn *v.* Crocker, 22 Ind. 324.

gation that an execution has been issued and that the sheriff has demanded the property or the payment of the judgment and costs to the extent of the appraised value, it will be demurrable.[1] But where a declaration in an action on a forthcoming bond averred that the defendant did not have the property according to the tenor and effect of the bond, but wholly and totally failed and neglected and refused to do so, the court said there was a sufficient allegation of a breach of the condition to entitle the plaintiff to recover.[2]

§ 299. (f) **Evidence to sustain the action.**—In an action on a bond given for the release of attached property it is unnecessary in most states to prove that a levy was made upon the property. The bond admits this fact.[3] It is a rule of almost universal application that the defendant in an action on such bond is estopped from denying any fact recited in such undertaking.[4] When a forthcoming bond is executed, received and returned by the sheriff, that is at least *prima facie* evidence that the statute has been complied with.[5] The sheriff's return upon a forthcoming bond is not conclusive, but only *prima facie* evidence.[6] It is the *seizure* of the levying officer which constitutes the levy on personalty, and the entry is merely his description thereof. Therefore, in an action on a forthcoming bond given in an attachment where the sheriff's return described certain articles in a house and made mention of all other goods therein, the evidence need not be restricted to the articles particularly described in the levy.[7] And in such an

1. Wright *v.* Manns, 111 Ind. 422, 12 N. E. Rep. 160.

But this rule does not apply where the sureties are rendered liable by the rendition of a judgment alone, no demand on execution being then necessary. See *supra*, § 291.

2. Young *v.* Campbell, 10 Ill. 80.

When the statute does not require an appraisement of the property prior to the making of a bond for its release, the plaintiff in an action on such bond need not aver that the value of the property was fixed by appraisement or agreement. Woodward *v.* Adams, 9 Iowa 474.

3. Crisman *v.* Matthews, 2 Ill. 148.

4. Higgins *v.* Healy, 47 N. Y. Superior Ct. 207.

But see further as to "Matter of Defense to the Action," *post*, § 300.

5. Woodward *v.* Adams, 9 Iowa 474.

6. Adler *v.* Green, 18 W. Va. 201.

7. Hart *v.* Thomas, 75 Ga. 529.

action, which avers a levy on the property attached, it is not necessary that the plaintiff introduced the attachment in evidence, where he has introduced the *fi. fa.* which issued on the judgment in attachment and was returned *nulla bona;* nor is it necessary to introduce the judgment itself where the *fi. fa.* shows the amount recovered by it.[1]

The fact that an attachment was made must be proved, in Kentucky, in order to show that there was a consideration for the giving of the bond.[2] But it is not necessary to prove the ground on which the writ was issued where the attachment has been sustained by an amended affidavit setting up other grounds filed after the sureties have sold the goods and applied the proceeds to the satisfaction of a debt due them. The attachment being sustained, the sureties are liable.[3]

For a like reason, it is necessary, at least in Kansas, to prove that the property was in fact returned to the defendant, or there can be no recovery.[4]

A declaration in debt on a bond given by the attachment defendant averred the death of the defendant before judgment, and that his administrator had been made defendant and judgment rendered against him. A plea was filed denying that there had been a judgment against defendant in his lifetime, or against his legal representative afterwards. And it was held that the transcript of the justice of the peace which showed a judgment in the attachment suit against the defendant in his individual capacity would not sustain the declaration.[5]

Under a statute which provides that where the plaintiff recovers a verdict in the attachment suit, judgment shall be entered against the defendant and his sureties on the replevin bond, it was held that where, in an attachment on a verified account, the defendant was served with process, but did not appear after replevying the property, it was proper to enter

1. Doyal *v.* Johns, 90 Ga. 188, 15 S. E. Rep. 776.

2. As to the evidence the defendant may introduce to show the invalidity of the attachment, and that in consequence thereof the bond was without the consideration. See *post,* § 300.

3. Hobson *v.* Hall, (Ky.) 14 S. W. Rep. 958.

4. McGonigle *v.* Gordon, 11 Kan. 167; Couse *v.* Phelps, 12 Kan. 153

5. Butler *v.* Wilson, 10 Ark. 313

judgment on the account against the defendant and his sureties on the replevin bond without the introduction of other evidence.[1]

In an action on a forthcoming bond, in Arkansas, given by the defendant in an attachment suit before a justice of the peace, it seems the transcript of such justice will be incompetent evidence if it fails to show that the cause of action was filed before the writ issued; or if it fails to have in it a copy of the affidavit required to support the suit. A recital of the substance of it is not sufficient, but if such record shows that the cause of action was filed on the same day the writ issued, it will be presumed that it was filed before the writ issued.[2] In Minnesota, where personal property owned by one person was attached at the suit of several creditors and was then sold by the attachment defendant to another person, who obtained its release by promising to pay the creditors as soon as he received the money for the property, it was shown that the property was delivered to him and that he went to the town where the property was sold and that the property was sold at that time, and that he made payment to one of the attaching creditors. The court presumed, in the absence of evidence to the contrary, that the property had been sold by his orders and that he had received pay for it, and sustained an action against him on his promise.[3]

The fact that the attachment debtor has executed a forthcoming bond is sufficient presumptive evidence that the property was found by the sheriff in the possession of such attachment defendant.[4]

§ 300. (g) **Defense to the action.**—The surety on a bond for the release of attached property can set up no ground of defense to the judgment rendered against his principal which the principal himself could not set up.[5] He can not deny that the plaintiff did not own the claim, for the collection of which the

1. Vogt *v.* Dorsey, 85 Tex. 90, 19 S. W. Rep. 1033.
2. Butler *v.* Wilson, 10 Ark. 313.
3. Brewster *v.* Leith, 1 Minn. 56.
4. Hoshaw *v.* Gullett, 53 Mo. 208.
5. McCloskey *v.* Wingfield, 32 La. Ann. 38.

attachment suit was brought.[1] And although gross irregularities procede the judgment, the sureties on a forthcoming bond must nevertheless produce the property or must satisfy the judgment on failure so to do.[2] Nor can he set up in defense any matter which has been waived by the giving of the bond, as hereinbefore shown.[3] Or by the payment of the value of the property, as the case may be. And though the bond may have been given in a suit begun against two defendants, it is no defense to an action on the bond that the judgment in the attachment suit was entered against the one defendant only.[4] But if the judgment in the attachment suit has been rendered against a different principal than the one in whose behalf the bond was executed, that fact will be a good defense in an action on the bond. As for example, where there was a substitution of defendants in the attachment suit after the bond was given.[5]

It is a well settled rule in most states that in an action on an undertaking for the forthcoming of attached property, defendants are estopped from denying any fact recited in the undertaking.[6] Therefore the defendant can not deny the fact that an attachment issued,[7] nor that the goods were attached.[8] Nor can he deny the sufficiency of the ground for obtaining the order of attachment, nor the liability of the property levied on;[9] He is estopped from denying the ownership of the property;[10] nor

1. McCloskey *v.* Wingfield, 32 La. Ann. 38.

2. Kirkland *v.* Boyle, 7 La. Ann. 369.

3. See *ante*, § 288.

4. Reynolds *v.* Hurst, 18 W. Va. 648.

5. Adams *v.* Jacoway, 34 Ark. 542.

6. Higgins *v.* Healy, 47 N. Y. Supr. Ct. 207; Fenner *v.* Boutte, (Miss.) 16 So. Rep. 259.

In an action on a forfeited delivery bond, the defendant can not plead the fact that after the forfeiture the defendant sued out an *alias fi. fa.* that the property first seized had been levied upon under it but returned to the defendant by the plaintiff's order. Sullivan *v.* Pierce, 10 Ark. 500.

Where a sale of attached property is not made on a day required by a statutory bond for want of bidders, the taking of a second bond is proper, and is conclusive evidence of the performance of the condition of the first bond. Adler *v.* Green, 18 W. Va. 201.

7. Coleman *v.* Bean, 1 Abb. (N. Y.) App. Dec. 394.

8. Crisman *v.* Matthews, 2 Ill. 148.

9. Hazelrigg *v.* Donaldson, 2 Metc. (Ky.) 445; Higdon *v.* Vaughn, 58 Miss. 572.

10. Wallace *v.* Truesdell, 6 Pick. 455; Johns. *v.* Church, 12 Pick. 557; Robinson *v.* Mansfield, 13 Pick. 139.

After judgment has been entered

can he deny the validity of the officer's levy.[1] A defendant having, by his voluntary act, induced the sheriff to rely and act upon the validity and sufficiency of his levy, he can not thereafter prejudice the officer by contesting its validity on ground inconsistent with the truth of his admissions contained in the undertaking.[2] Nor can the sureties on a forthcoming bond in an action against them after default has been made by their principal in a covenant of such bond be heard to deny their liability on the grounds that the sheriff who made the levy had not the authority so to do.[3]

But the jurisdiction of the court in making such attachment may be denied by the obligors under proper pleading in an action on the bond given for the release of the attached property, brought after judgment against the defendant in the attachment suit. The fact that the attachment was issued upon a false or defective affidavit is a good defense in such action since, in such case, the court was without consideration.[4] And the affidavit itself may be offered in evidence in such case for the purpose of showing that it was false.[5] This rule is not in contradiction with the one which states that the sureties can

sustaining an attachment, the sureties can not discharge their liability by asserting that the property was purchased with money they had advanced to the debtor, and was not subject to such attachment. Hobson *v.* Hall, (Ky.) 14 S. W. Rep. 958.

Where an attachment was sued out and delivered to the sheriff, who received an offer from the defendant of a bond with one name appearing as surety, conditioned to perform the judgment of the court, which the sheriff refused to accept without further surety, when a second surety was procured to sign the bond and it was accepted by the sheriff, the defendant retaining the property; judgment was obtained in the action; an action was brought upon the bond; the first surety named was released on a plea of *non est factum*. The court held that the second surety was liable at common law because it was no fault of the plaintiff that the name of the first surety was improperly attached to the bond. Cook *v.* Boyd, 16 B. Mon. (Ky.) 556.

1. Scanlan, *v.* O'Brien, 21 Minn. 434.

2. Easton *v.* Goodwin, 22 Minn. 426; People *v.* Reeder, 25 N. Y. 302; Dezell *v.* Odell, 3 Hill (N. Y.) 215; Scanlan *v.* O'Brien, *supra;* Haxtun *v.* Sizer, 23 Kan. 310.

3. Abbott Williams, 15 Colo. 512, 25 Pac. Rep. 450.

4. Murphy *v.* Montandon, 2 Idaho 1048, 29 Pac. Rep. 851.

5. Murphy *v.* Montandon, 2 Idaho 1048, 29 Pac. Rep. 851.

set up no defense which is not open to their principal, because it is a rule of universal application that the want of jurisdiction may be taken advantage of at any time even in a collateral proceeding, but this rule still holds good and if such want of jurisdiction could not be made available by the attachment defendant himself it can not be taken advantage of by the sureties on the bond. Therefore where an action is brought against the sureties upon a bond given to release the attachment from goods levied upon, the defendants in such suit can not offer in defense the fact that the affidavit for the writ was defective, when the attachment defendant, having been personally served, did not question the sufficiency of such affidavit in the attachment cause, but suffered judgment to be entered against him; and where the defendants to the suit on the bond have expressly stipulated that the attachment was begun in due form of law.[1] By showing the invalidity of the attachment in defense to a suit on the forthcoming bond, the parties to such bond do not prejudice the officer, for if the attachment be proved invalid, the officer will be no longer liable to the attachment creditor and hence this rule does not conflict with the one above stated.

In Illinois and Michigan a surety on a bond given for the release attached property can not set up as matter of defense, and thereby discharge himself from liability, the fact that the property did not belong to the defendants in the attachment, or that it was unencumbered.[2] The court in one case asking what business it is to the surety if the property did belong to a third person, and saying that by the execution of the bond the parties thereto become the custodian of the property for the sheriff and bound to him to keep it in good faith, as stipulated.[3] Likewise in Missouri a person who has, in an attachment suit against another, given a bond conditioned that the attached property should be forthcoming, will be estopped, after judgment against the defendant in the attachment, from

1. Goebel *v.* Stevenson, 35 Mich. 172.
2. Gray *v.* MacLean, 17 Ill. 404; Dehler *v.* Held, 50 Ill. 491; Dorr *v.* Clark, 7 Mich. 310.
3. Gray *v.* MacLean, 17 Ill. 404.

interpleading and claiming the property as his own.[1] But in Georgia and Louisiana, in an action on a forthcoming bond, he may release himself by showing that the attached property belonged to another than the attaching defendant.[2] Such a defense is also available in Iowa; but under the rule requiring the defendant to plead and defend, a plea averring that at the time of the levy the property did not belong to the attachment defendant will not be sufficient unless it also states who is the owner of the property.[3]

Where the bond given for the release of attached property contains the alternate condition to redeliver the property to the attaching officer, or pay on demand, the appraised value of the property, or the amount of the judgment, as the case may be, an inability to redeliver such property—as by the accidental destruction of the property by fire—is no defense to an action on such bond.[4] It is no defense to an action against the obligors on a forthcoming bond that after judgment and execution were obtained against the attachment-defendant, they point out to the plaintiff the property of the defendant upon which his execution could have been levied.[5] Nor is it a defense to an action on a common-law bond, given for the return of attached property, that the day of delivery is different from the day of sale mentioned in the bond, but it may be in an action on a statutory bond.[6]

Where an injunction has been sued out to restrain the enforcement of the execution, it will be an excuse for not deliv-

1. McElfatrick *v.* Macauley, 15 Mo. App. 102.

2. Lackey *v.* Mize, 75 Ga. 692; Schlater *v.* Broaddus, 3 Martin, n. s. (La.) 321.

3. Blatchley *v.* Adair, 5 Iowa 545.

4. Doggett, Bassett and Hills Co. *v.* Black, 40 Fed. Rep. 439; Goebel *v.* Stevenson, 35 Mich. 172.

5. Hill *v.* Merle, 10 La. 108.

6. Adler *v.* Green, 18 W. Va. 201.

If, on the date of sale and at the place of sale, the officer goes through the rooms, where the property, consisting principally of house furniture, is situate, and the execution debtor makes no effort to prevent the sale, there is a delivery of the property sufficient to satisfy the condition of the bond, notwithstanding the fact that the debtor may claim that all the property is exempt from sale and that third persons may claim part of the property as their own. Adler *v.* Green, 18 W. Va. 201.

ering the attached property when demanded on execution, and such refusal will not be a forfeiture of the bond.[1]

An off-set may be properly claimed in an action on a forthcoming bond, or application made in satisfaction of the judgment to be entered, when a part or the whole of the property, or of other property accepted in lieu of it, has been applied to the satisfaction or partial satisfaction of the judgment.[2] When the property, which is the subject of the forthcoming bond, has been taken to satisfy prior liens, so that the obligors can not produce such property, then in an action against them on such bond they may off-set the plaintiff's demand by showing that the property was not more than sufficient to satisfy the prior liens upon it and will then only be liable for nominal damages.[3] And where part of the property mentioned in a forthcoming bond has been, by the attaching officer, applied to the satisfaction of any process in his hands and he has thereby prevented compliance with the condition of the bond, it works a discharge of the obligors to the extent of the property sold. And this even though applied on a process running against the defendant himself.[4] And even though a special statute may give to the return of a forthcoming bond forfeited the force and effect of a judgment and authorized issuance of an execution thereon for the amount of the recovery in the attachment suit, such application of property by the officer may be shown as an off-set thereto. Such a statute is intended merely to provide a summary remedy, and not to deprive the obligors of any defense which they might have set up against the bonds at common law.[5] Where the attachment plaintiff brings an action on the bond for the return of the property, it is no defense thereto that after the giving of such bond the sheriff refused to surrender such property to the obligors and retained possession thereof himself. Such possession by the sheriff was wrongful and not for the plaintiff, and hence is only available in an action by or against such sheriff.[6] Furthermore, if the

1. Hull *v.* Bloss, 27 W. Va. 654.
2. Munter *v.* Leinkauff, 78 Ala. 546.
3. Hayman *v.* Hallam, 79 Ky. 389.
4. Dunlap *v.* Clements, 18 Ala. 778.
5. Dunlap *v.* Clements, 18 Ala. 778.
6. Gardner *v.* Donnelly, 86 Cal. 367, 24 Pac. Rep. 1072.

sureties on the replevin bond were fraudulently induced by the sheriff to sign it when they thought they were signing a bond for the forthcoming of the attached property, the plaintiff not uniting in the fraud and the bond being that required by the statute, the sureties will not be discharged from their liability on the bond, but may have redress against the sheriff.[1] Neither can the sureties on the bond for possession complain that the attachment bond was not executed by the attachment plaintiff but by his attorney in his behalf where no objection was raised, because thereof, in the attachment suit.[2]

Any fact or circumstance which will discharge the surety on the bond as hereinbefore shown,[3] may of course be relied upon by him should an action be brought against him on the bond, but since his liability accrues at the time of default of the conditions of the bond, regardless of the time suit is begun, he can not avail himself of any matter arising subsequent to such forfeiture, even though prior to the commencement of the action on the bond.[4] Where the parties defendant in the action on the bond are not the same, but the same in number as the defendants against whom judgment was rendered in the attachment suit, this fact may in some states be shown as a complete defense.[5]

Where a person has claimed the attached property as his own, and has obtained possession of it by giving a forthcoming bond, and an action is thereafter brought upon such bond, he may plead in bar of such action the fact that he has inter-

1. Craig *v.* Herring, 80 Ga. 709, 6 S. E. Rep. 283.

2. Craig *v.* Herring, 80 Ga. 709, 6 S. E. Rep. 283.

This decision was rendered under a code providing that judgment may be taken against the defendant and his sureties, and the sureties be bound thereby, although they were not served with process and had not appeared to defend. Craig *v.* Herring, 80 Ga. 709, 6 S. E. Rep. 283.

3. See *ante*, § 292.

4. Falls *v.* Weissinger, 11 Ala. 801.

5. See *ante*, § 297.

Where an execution was issued in the names of all the defendants, which was proper, although one of them was dead, and the clerk indorsed thereon that the one had "departed this life," and a forthcoming bond taken on the execution, recited that it was against three, which was the number of living defendants, it was held that there was a material variance in the bond, and that it should be quashed therefor. Holt *v.* Lynch, 18 W. Va. 567.

pleaded in the main action and claimed the property and that the jury has found for him, if such be the fact, and such finding will be a good defense for not surrendering the property.[1] One who has intervened in the attachment suit and obtained possession of the attached property is thereafter estopped from denying the fact that the property has been attached. By the giving of the bond he judicially admitted the fact of the attachment.[2]

§ 301. (h) **Judgment in action on forthcoming bond.**—The time when an action may be brought upon the bond given for the return of attached property, as hereinbefore mentioned,[3] will determine when a judgment may be obtained against the parties to such bond, for, of course, no valid judgment can be entered where a cause of action has not accrued. Hence, a judgment against sureties on a bond given for the release of attached property rendered before a judgment against the defendant upon the cause of action for which the suit is brought, is void.[4]

The amount for which a judgment should be entered in an action on a bond given for the release of attached property, is a question of much importance, and one that is not always easy to determine. It will, of course, largely depend upon the tenure of the bond itself. If the covenant be for the return of the property alone, a breach of such covenant will entitled the obligee to recover the value of the property at the time of default.[5] But if there be the alternate undertaking to pay the

1. Purcell *v.* Steele, 12 Ill. 93.

2. Frost *v.* White, 14 La. Ann. 140. See further, as to this rule of admission, *ante*, § 288.

3. See *ante*, § 294.

4. Morning *v.* Alexander, 10 Heisk. (Tenn.) 606.

In Kansas, if the attachment plaintiff does not demand an assessment of the property kept in possession of the principal in the forthcoming statutory bond, judgment can not be obtained upon such bond. Lowenstein *v.* McCadden, 54 Ark. 13, 14 S. W. Rep. 1095.

5. Collins *v.* Mitchell, 3 Fla. 4; Hunter *v.* Brown, 68 Ind. 225.

The judgment against the sureties on the statutory bond in Arkansas must be for the value of the property as assessed by the court or jury before whom the action on the bond is tried, and not for the value as fixed by the appraisers when the bond was given. Fletcher *v.* Menken, 37 Ark. 206.

In Rhode Island it was held that

amount of the judgment, then the amount of such judgment will be the measure of damages in such case.[1] But in no case can the obligee recover a sum greater than the amount of the judgment in the attachment suit.[2] And on the other hand he can recover no judgment in a greater amount than the penalty named in the bond,[3] unless the law positively fixes the liability without respect to the language used.[4] Hence, if the covenant in the bond be for the return of the property alone, and default be made in such bond, the value of the property will be the extent of the judgment that can be entered against the sureties on the bond.[5] Or if the penalty alone be mentioned, or a penalty greater than the value of the property named, then such sum will be the extent of the judgment that can be recovered against such sureties, even though the judgment recovered in the attachment suit be for a greater amount.[6] Hence where a bond was given in double the amount of the debt conditioned for payment of the value of the property and alternately for the payment of the debt, etc., and the value of the property is less

the sureties were only liable for the value of the goods attached, although that was less than the amount of the judgment, where the bond which they had signed to obtain the surrender of the goods was conditioned that it should be void if the goods should be returned upon demand on execution after judgment, "or if the judgment should be paid," and the statutory requirement was that the sheriff should surrender the goods on giving the bond in double the value of the goods, the bond to be void if the goods be returned "unless" the judgment be paid. Pearce *v.* Maguire, 17 R. I. 61, 20 Atl. Rep. 98.

1. Collins *v.* Mitchell, 3 Fla. 4.

2. Hammond *v.* Starr, 79 Cal. 556, 21 Pac. Rep. 971; Lemle *v.* Routon, 33 La. Ann. 1005; Schmidt *v.* Brown, 33 La. Ann. 416.

A bond was conditioned that the obligor should "pay plaintiff such sums as may be adjudged them in the action or that the attached property shall be forthcoming and subject to the court." The court said in an action thereon that upon failure to have the property forthcoming a judgment for the amount recovered was proper. But where the property was actually forthcoming and subject to the order of the court, a judgment for the amount recovered in the attachment which was greater than the value of the property would not be proper. Bell *v.* Western River, etc., Co., 3 Metc. (Ky.) 558.

3. Duffy & Mehaffy *v.* Lytle, 5 Watts (Pa.) 120; McCutcheon *v.* Weston, 65 Cal. 37; Preston *v.* Hood, 64 Cal. 405.

4. Ferguson *v.* Vance, 3 Lea (Tenn.) 90.

5. Baker *v.* Morrison, 4 La. Ann. 372.

6. Palmer *v.* Vance, 13 Cal. 553.

than the amount of the judgment, then the sureties are not entitled to have their judgment restricted to the value of the property, but a judgment for the amount of the debt is proper.[1] A Michigan statute provided that in case of failure to perform the condition of a bond given to obtain the release of attached property, the plaintiff was entitled to recover thereon the full value of the property attached, or so much as would be sufficient to satisfy the judgment rendered in the attachment suit. Under this statute it was held, in a suit on the bond, that the plaintiff was entitled to recover the full amount of the judgment in the attachment suit without respect to the value of the attached property.[2]

Nominal damages only can be recovered against the obligors in a forthcoming bond for a failure to produce the property attached when such property was not more than sufficient to satisfy prior liens upon it.[3]

In Alabama, under a statute, a sheriff who takes a claim bond for the return of the attached property may, after trial of the question of ownership, recover a judgment on the bond for the full amount, unless the whole of the attached property is returned, and any credits which should be made because of a return of part of the property, or because of other property having been given in lieu of the attached property, will go to the satisfaction of such judgment.[4]

But while off-sets may be shown against the judgment to be entered, or an application made in satisfaction of the judgment when entered, by reason of the return of all, or a part of the attached property, yet it seems that if the obligee in the forthcoming bond accept a part of the property, such acceptance by him is no election to measure his recovery upon the bond by the value of the remainder of the property rather than by the remainder of the debt.[5]

Judgment may, in some states, be entered in the main case

1. Bond *v.* Greenwald, 4 Heisk. (Tenn.) 453.
2. Phansteihl *v.* Vanderhoof, 22 Mich. 296.
3. Hayman *v.* Hallam, 79 Ky. 389.
4. Munter *v.* Leinkauff, 78 Ala. 546.
5. Brumby *v.* Barnard, 60 Ga. 292.

against the sureties on a forthcoming bond by force of statute without the necessity of bringing a separate suit against them,[1] and in some cases, even without the necessity of *scire facias* or notice. And where, by force of the state statute, the bond given to obtain the release of the property, conditioned for its redelivery to the officer, forms a part of the record, and where in the event of the plaintiff's recovery, judgment may be entered against the principal and sureties on the bond without *scire facias* or notice, a judgment entered against such sureties is not void for want of notice, even though the surety may be a non-resident of the state at the time.[2]

Part II. By Bond to Pay Judgment.

§ 302. **General nature of the bond, and defendant's privilege in regard thereto.**—The two classes of bonds which may be given by the attachment defendant, in order to obtain or retain possession of the property attached, *i. e.*, delivery or forthcoming bond, and bond to pay the judgment, have been hereinbefore spoken of in regard to their comparative nature.[3] The particular rules governing the former have been pointed out in the foregoing part of this article, and we have now to treat of the latter class. And first it may be said that the right to have an attachment set aside by giving an obligation to satisfy the judgment which may thereafter be obtained by the attachment plaintiff against the defendant in the attachment suit, is a *privilege* which the law affords to the defendant, and not a duty enjoined upon him, and hence such attachment defendant may consult his own pleasure in giving or not giving such bond; and the plaintiff can not complain if the defendant fails to exercise such privilege.[4] Nor can he take any steps to prohibit it, for we know of no statute or rule of law forbidding the taking of security for a debt on which a suit is pending, whether commenced by foreign attachment or otherwise. Such a bond is

1. See *ante*, § 295.
2. Kuhn *v.* McMillan, 3 Dill. Md. 372.
3. See *ante*, § 286.
4. Watson *v.* Kennedy, 8 La. Ann. 280; Lecesne *v.* Cottin, 10 Martin (La.) 174.

good at common law.[1] The defendant's right to retain the possession of the attached property, and his further right to have the attachment lien absolutely dissolved upon the giving of a bond to pay whatever judgment may be rendered, is an incident to every species of attachment in states where the statute provides for the giving of a bond to pay judgment, but in order to make it effective there must be a strict compliance with a special statute which prescribes the conditions of such bond.[2]

When the conditions of such bond are that the obligors thereon will satisfy any judgment that may be recovered against the defendant in the attachment suit—and this is the usual condition—the recovery of such judgment fixes the amount to be paid by the obligors, so that the judgment creditor's cause of action is for the recovery of liquidated damages, and within any statutory provision that may be made regarding the same.[3]

The bond to pay the debt or judgment for the recovery which the attachment has been begun, may be given by the defendant, and the property released at any time before final judgment is rendered in the attachment suit.[4]

No one but the defendant in the attachment suit can give such bond, unless the statute specially authorizes it to be given by a third party.[5] There is generally a statute by which persons who claim to own the attached property may intervene and claim such property and get possession thereof by giving the required bond, but the consideration of the law in regard to interveners is not

1. Wright *v.* Keyes, 103 Pa. St. 567. See further as to when such bond may be given in Pennsylvania. Fitch *v.* Ross, 4 Serg. & R. (Pa.) 557; Bushel *v.* Com. Ins. Co., 15 Serg. & R. (Pa.) 173.

2. Bell *v.* Western River, etc., Co., 3 Metc. (Ky.) 558.

3. McAllister *v.* Eichengreen, 34 Md. 54.

4. Garrett *v.* Tinnen, 8 Miss. (7 How.) 465; Woodward *v.* Witascheck, 38 Kan. 760, 17 Pac. Rep. 658.

And, in case of an attachment issued against an absconding debtor under the statute in Mississippi for a debt not due, the defendant can not procure the discharge of the property unless he gives bond, with sufficient surety, to pay the debt when it shall become due. He can not give a special bail bond in such a case, for such practice was abolished by the act of 1840. Garrett *v.* Tinnen, 8 Miss. (7 How.) 465.

5. Kling *v.* Childs, 30 Minn. 366.

relevant here and will be considered in a subsequent article. But it may be relevant to state that in Louisiana, at least, a person, by intervening and bonding the property attached and thereby releasing the lien of the attachment and removing it from the jurisdiction of the court, becomes consequently bound as surety for whatever judgment may be rendered against the defendant.[1] And in Louisiana no party can bond attached property who has not been in actual constructive possession, as owner of it, at the time it was attached. But although an intervener may move to bond the property and his motion be dismissed, the intervention will nevertheless stand.[2] However, the subject of interveners will be taken more fully into consideration in a subsequent article.

When an attachment is made upon the goods and effects of both and each of two joint debtors, there can be no release of the joint and separate effects unless a sufficient bond or bonds be given for both. Bail will not be received for one only, to discharge his separate goods.[3] And the Massachusetts statute providing that personal property which has been attached in a suit against one part owner shall, at the request of the other part owner, be appraised and delivered to him upon his bond to the attaching officer, does not apply to the attachment of partnership property in an action against one partner.[4]

§ 303. **Sufficiency of the bond to pay judgment.**—In the first place, the bond given for the payment of the judgment which may be obtained in the attachment suit, must be given in a case in which there is a valid attachment then pending, or such bond will be without consideration and void.[5] But in a bond

1. Ledda *v.* Maumus, 17 La. Ann. 314.

As to the giving of the bond to release the property in the hands of a garnishee, see *post*, Vol. II, "Garnishment."

2. Letchford *v.* Jacobs, 17 La. Ann. 79.

3. Magee *v.* Callan, 4 Cranch C. Ct. 251.

4. Breck *v.* Blair, 129 Mass. 127.

5. Pacific Bank *v.* Mixter, 124 U. S. 721; Woodward *v.* Witascheck, 38 Kan. 760, 17 Pac. Rep. 658.

Where a claimant has interpleaded, and where default judgment has been taken against the defendant debtor, and the same has never been paid; and where the interpleader has been adjudged to own the property, and the

of this class, like in a redelivery bond,[1] no consideration need be mentioned in the bond, or proved in an action on the bond.[2] The release of the attachment is itself the consideration.[3]

The general condition, required by the statute in all bonds of this class, is, that the attachment defendant shall pay whatever judgment may be rendered against him in the attachment suit then pending.[4] And some require that the defendant shall appear in person or by attorney and thus render himself liable to a judgment on his default to answer.[5] But a bond conditioned only that the defendant will appear and answer to the suit is not sufficient, and the officer is not bound to take such bond.[6] But where the attachment has been dissolved by a bond having been executed by the debtor and sureties, and accepted by the creditor, it will not be then invalidated because of a failure to contain a condition required by a special statute obliging the sureties to pay a special judgment, provided for by statute, in order to meet a case of bankruptcy on the part of the defendant.[7]

The bond is required in most cases to be given before the rendition of judgment in the attachment suit,[8] but under one statute the defendant had a year and a day within which to disprove the debt, and the security for the restoration of the property need not be given before the issuing of the execution, for it was sufficient if at any time before the sale.[9] In some

attachment discharged, and a stay thereon has been granted to enable the plaintiffs to appeal, a bond given by the interpleader during the suspension of the judgment is without consideration, and no liability arises against the sureties thereon. Woodward *v.* Witascheck, *supra*.

1. See *ante*, § 287.

2. Higgins *v.* Healy, 47 N. Y. Supr. Ct. 207.

3. As to such a bond given to a third party, being upon a good consideration, see Central Mills Co. *v.* Stewart, 133 Mass. 461.

4. Eimer *v.* Richards, 25 Ill. 260; Slosson *v.* Ferguson, 31 Minn. 448; Moody *v.* Morgan, 25 Ga. 381; Bushel *v.* Com. Ins. Co., 15 Serg. & R. (Pa.) 173.

5. Rathbone *v.* London, 6 La. Ann. 439; Love *v.* Voorhies, 13 La. Ann. 549.

6. People *v.* Cameron, 7 Ill. (2 Gilm.) 468.

7. Mosher *v.* Murphy, 121 Mass. 276. See further as to requisites of bond in Massachusetts, Commonwealth *v.* Costello, 120 Mass. 358, 368.

8. Woodward *v.* Witascheck, 38 Kan. 760; Garrett *v.* Tinnen, 8 Minn. 465.

9. Fitch *v.* Ross, 4 Serg. & R. (Pa.) 557.

states the bond may be given for the release of property, not only after the seizure but before the levy is made to prevent a seizure of the property from being made. But the latter must be done after the attachment writ is in the hands of the officer.[1]

It is almost universally required that a bond of this class should run to the plaintiff, and not to the officer, like a bond of the preceding class, for the condition of this bond is to pay the judgment which may be obtained, and the effect is to dissolve the attachment, and therefore the sheriff has little or no interest in the performance of its conditions.[2] However, such a bond running to the sheriff conditioned to hold him harmless "and to pay whatever judgment may be rendered against the defendant," although not strictly such an undertaking as is contemplated by the statute, yet when conforming substantially to the statutory requirements will be presumed to have been executed with reference to the statute and will be interpreted by the light thereof and held sufficient.[3]

The bond must, for obvious reasons, be so worded as to identify the action in which it was given. In an attachment brought against two persons jointly, process was served only upon one and no property but his was attached. A third person gave a bond to dissolve the attachment describing the action as against the one served alone, and containing a condition to pay any judgment that might be recovered in that action, judgment being rendered against the defendant alone who was served. The court held in an action on such bond that it sufficiently identified the suit in which it was given.[4]

1. Hartwell *v.* Smith, 15 Ohio St. 200; McIntosh *v.* Hurst, 6 Mont. 287.

2. An attachment suit was begun against the owner of a vessel. A bond given was made payable to the "owner." This was held to be a sufficient description. Bryan *v.* The Enterprise, 8 Jones (N. C.) L. 260.

A statute in Minnesota requiring that the bond given to dissolve the attachment should run "to the plaintiff" and be payable "if the plaintiff recover judgment in the action," was satisfied by a bond to a specifically named plaintiff conditioned to pay if "said plaintiff recover judgment in said action." Slosson *v.* Ferguson, 31 Minn. 448.

3. Heynemann *v.* Eder, 17 Cal. 433.

4. Central Mills Co. *v.* Stewart, 133 Mass. 461.

An undertaking given to procure the discharge of property attached in two different actions is invalid.[1]

This recognizance, conditioned that the attachment defendant and his sureties shall pay whatever judgments are rendered in the attachment suits, may be entered into in open court.[2] And where the statute permits a release bond to be entered into before the clerk of the court when the sheriff has returned the writ, and a bond is taken by the clerk, it will be presumed that the sheriff had then returned the writ, although the return day had not then arrived.[3]

Under many statutes the sureties to an undertaking given to procure the release of attached property must justify as to their financial worth, and when this is required it is a matter of substantial right with the plaintiff which he does not waive by a verbal consent to the entry of an order for the discharge of the property, and under the New York code it is the duty of the sheriff to retain possession of the property until there has been an opportunity for the justification of the sureties, even though there has been an ex-party approval of the undertaking by the court. The entry of an order for a surrender of the property without a justification of the sureties or a waiver of the plaintiff's right to object for lack thereof is erroneous and will be corrected on motion.[4]

When the statute requires the sureties on a release bond to justify by affidavit, such an affidavit made before the attorney for the defendant will not procure the discharge of the attachment,[5] especially in any state forbidding affidavits to be made before an attorney to the action to be filed in the case.[6]

The sureties on a bond given for the release of attachment must reside within the jurisdiction of the court, in order that the creditor may have his remedy against them in case the debtor should make default in the payment of the judgment

1. Walton *v.* Daly, 17 Hun (N. Y.) 601.
2. Eimer *v.* Richards, 25 Ill. 260 (289).
3. Morrison *v.* Alphin, 23 Ark. 136.
4. Moses *v.* Waterbury Button Co., 15 Abb. (N. Y.) Pr. n. s. 205.
5. Bliss *v.* Molter, 58 How. (N. Y.) Pr. 112.
6. Kansas and Michigan have statutes of this character.

obtained. In Massachusetts, they must reside within the state in order that the creditor may have his remedy by *sci. fa.*, or debt, given him by the statute, either of which would be imperfect but for such residence.[1] The release of the property from attachment, upon the giving of security, can only be procured by the giving of security for the whole of the property levied on. It can not be dissolved as to a part of the property merely, on giving security as to that part.[2]

Mere clerical errors in the condition of a bond given to dissolve the attachment will not vitiate the bond, if by a construction of the instrument the intention of the parties can be ascertained.[3] The same principle applying in a bond of this class as in the case of a forthcoming bond.[4] A clerical error, in the condition of such a bond, whereby the name of the plaintiff is substituted for that of the defendant, will not invalidate the bond nor make a fatal variance in a declaration thereon.[5]

Statutes requiring a bond to be given to procure the release of attached property contemplate the security of the creditor, and if a statute direct the taking of two sureties, the creditor may waive his right thereto, if he choose, and agree to a bond with one surety.[6] And when such a bond with one surety can be given and the property discharged, the defendant will not be thereafter heard to object on the ground that the bond was not valid on account of having but one surety when the statute required two.[7]

When it is required by a rule of court that the bond given to procure the discharge of attached property shall be acknowledged by the sureties, and a bond defective in this regard has been approved without the defect having been noticed, an application should be made to the court to have the bond ac-

1. Choate *v.* Stark, 18 N. H. 131.

2. Royal Ins. Co. *v.* Noble, 5 Abb. (N. Y.) Pr. n. s. 54.

As to obtaining possession of part of attached property on a redelivery bond, see *supra*.

3. Leonard *v.* Speidel, 104 Mass. 356; Hewes *v.* Cooper, 115 Mass. 42.

4. See *ante*, § 287.

5. Hewes *v.* Cooper, 115 Mass. 42.

6. Ward *v.* Whitney, 3 Sandf. (N. Y.) 399.

7. Ward *v.* Whitney, 8 N. Y. (4 Seld.) 442.

knowledged. However, a court in Minnesota was allowed in its discretion to excuse the compliance with such a rule.[1] But where the statute particularly requires an act like the acknowledgement or justification of a bond by the sureties, a bond lacking the same would not release the attachment. However, if such bond were accepted by the plaintiff, and the property released to the defendant, such defendant or sureties would be unable to take advantage of such deficiency, because of the consideration having been good and the contract executed.[2] Any defects or irregularities in the preliminary affidavits will not make the bond void when it was voluntarily made.[3]

It seems that a court has no power whatever to order additional sureties on a bond to discharge an attachment, even though an original surety may have become insolvent and a motion be made in the court to do so.[4]

§ 304. **Effect of the bond to pay judgment.**—When, for the purpose of releasing attached property (or to prevent property from being attached),[5] a bond is given to pay the judgment which the attachment plaintiff may thereafter procure against the attachment defendant, the principal effect of such bond is to dissolve the attachment (if levied) and discharge the property from the attachment lien, and the case will then proceed as if originally begun by summons.[6] The bond stands in lieu of the *rem*.[7] The property is gone from the court's con-

1. Gale *v.* Seifert, 39 Minn. 171, 39 N. W. Rep. 69.

2. The author.

3. Franklin *v.* Pendleton, 3 Sand. (N. Y.) 572.

4. Dudley *v.* Goodrich, 16 How. (N. Y.) Pr. 189. See *ante*, § 287.

5. Myers *v.* Smith, 29 Ohio St. 120.

6. Hill *v.* Harding, 93 Ill. 77; People *v.* Cameron, 7 Ill. 468; Myers *v.* Smith, 29 Ohio St. 120; Schuyler *v.* Sylvester, 28 N. J. L. (4 Dutch.) 487; Taylor *v.* Taylor, 3 Bush (Ky.) 118; Blaney *v.* Randel, 3 Harr. (Del.) 546; Dickerson *v.* Simms, 1 N. J. L. (Coxe) 199; Anon, 10 N. J. L. (5 Hals.) 60; Fleming *v.* Rushton, 1 Brev. (S. C.) 383; Cain *v.* Shakespeare, 12 Phila. 196; Brenner, Trucks & Co. *v.* Moyer, 98 Pa. St. 274; Parker *v.* Brady, 56 Ga. 372; Dierolf *v.* Winterfield, 24 Wis. 143.

7. United States *v.* Mosely, 7 Saw. C. C. (U. S.) 265; Easton *v.* Ormsby, (R. I.) 27 Atl. Rep. 216; Kendall *v.* Brown, 7 La. Ann. 668; Barriere *v.* McBean, 12 La. Ann. 493; Wyman *v.* Hallock, (S. D.) 57 N. W. Rep. 197.

trol.[1] The bond is special bail and is a substitute for the property as regards all claims that may be made against it by the promoter of the suit.[2] The attachment has expended its force and is no longer operative.[3] The bond dissolves the attachment entirely. It is not given for the property itself, but for the payment absolutely of the judgment when recovered in the suit, whatever may be the amount,[4] if within the penalty named in the bond. It is a security for any judgment which would have been satisfied out of the attached property.[5] And this, although there may be, by leave of court, a discontinuance as to all the defendants named in the bond except the administrator of one deceased.[6] In fact, it has been said that a bond, given to the plaintiff, to pay the judgment that may be recovered by him, operates not only to release the levy, but to destroy the writ itself, and that thereafter a motion to dissolve the attachment as being irregularly or improvidently issued, will not be entertained.[7] There is no levy to be quashed after the bond is given and the property released.[8]

1. McRae *v.* Austin, 9 La. Ann. 360.

In Louisiana, it is said that the bond is only a substitute for the attached property, as between the attachment plaintiff and the attachment defendant, and not as to a third person intervening and claiming title to the property attached. For example, property was attached and bonded by an intervener who claimed to own it. Judgment was entered against the attachment defendant, and a suit was brought against the intervener by a third person claiming to own the property, and the plaintiff in attachment was cited in warranty by the defendant. The court held that as the liability of the intervener on his bond had become fixed by the judgment, the plaintiff could not thereafter be held by warranty. White *v.* Hawkins, 16 La. Ann. 25.

2. Gillispie *v.* Clarke, 1 Tenn. 2; Fife *v.* Clarke, 3 McCord (S. C.) 347; United States *v.* Ames, 99 U. S. 35.

3. Austin *v.* Burgett, 10 Iowa 302.

4. Carpenter *v.* Turrell, 100 Mass. 450.

5. Inbusch *v.* Farwell, 1 Black (U. S.) 566.

6. Inbusch *v.* Farwell, 1 Black (U. S.) 566.

7. Fox *v.* Mackenzie, 1 N. Dak. 298, 47 N. W. Rep. 386.

In Mississippi, the giving of a replevy bond is a waiver of any technical objections that may exist regarding the form of levy. Wharton *v.* Conger, 9 Smedes & M. (Miss.) 510.

Nor in Louisiana can the defendant or his sureties object to the proceedings as being irregular because an inventory has not been filed as required by the statute. The giving of a bond is a waiver of the informality. McRae *v.* Austin, 9 La. Ann. 360.

8. Morrison *v.* Alphin, 23 Ark. 136.

Since the effect of giving such an undertaking is to dissolve the attachment and release the property attached, it follows that the property at once becomes subject to another attachment or to execution.[1]

In Texas, by virtue of special statutory provisions, the giving of special bail has four effects: (1) The property is restored to the possession of the owner; (2) An appearance of the defendant is effected by it; (3) The action ceases to be an action *in rem*; and (4) judgment may be entered against the obligors on the bond if the attachment plaintiff prevail.[2] In Louisiana, likewise, it operates as a personal appearance and the defendant must then defend the suit or he must satisfy the personal judgment against him.[3]

In many states the giving of a statutory bond for the release of property, which has been attached, is a waiver on the part of the defendant of his right to move to dissolve the attachment for the insufficiency of the grounds on which it was sued out, or for irregularity.[4] And in Wisconsin his traverse of the affidavit for the attachment may be stricken from the files and the case will proceed as though no attachment had been issued.[5] In Connecticut it is said that a recital in a bond given to dissolve the attachment, that the property has been attached, estops the obligors from denying the defendant's interest in the property.[6] But since the obligation of the bond, given

1. Duncan *v.* Thomas, 1 Ore. 314.

For particulars regarding the effect of a dissolution, see *post*, § 326, "Dissolution of Attachment."

2. Shirley *v.* Byrnes, 34 Tex. 625; Kennedy *v.* Morrison, 31 Tex. 207.

3. Kendall *v.* Brown, 7 La. Ann. 668; Barriere *v.* McBean, 12 La. Ann. 493; Bush *v.* Dewing, 24 La. Ann. 272.

To what extent a third person, who claims the property and intervenes and procures its release, is to be considered a party to the action is a question that will receive consideration when we come to treat the rights of interveners. See *post*, § 426.

4. Inman *v.* Strattan, 4 Bush (Ky.) 445; Fox *v.* McKenzie, 1 N. D. 298, 47 N. W. Rep. 386; McLaughlin *v.* Wheeler, 2 S. D. 379, 47 N. W. Rep. 816; Ferguson *v.* Glidewell, 48 Ark. 195, 2 S. W. Rep. 711; Rachelman *v.* Skinner, 46 Minn. 196, 48 N. W. Rep. 776.

5. Dierolf *v.* Winterfield, 24 Wis. 143.

6. Birdsall *v.* Wheeler, 58 Conn. 429, 20 Atl. Rep. 607.

And this, though the bond refers to the officer's return, which states that, by virtue of the precept, he found in defendant's possession and attached the property described, because the

under the statute to dissolve an attachment, is to pay the actual value of the defendant's interest, if it does not exceed the amount of the recognizance, the extent of the amount may be shown, although he is estopped from showing that he has no interest.[1] The recitals in the bond are conclusive as between the parties to it, and not only the attachment defendant, but his sureties are estopped from denying that the property attached did not belong to the principal as it was believed to when attached.[2]

But on the other hand many states reasonably hold that the fact that one whose property has been attached has given the bond required by law to secure its release and "performed the judgment of the court" does not estop him from contesting the validity of the attachment, as he might do, if such bond had not been executed and the property had remained in the hands of the officer; and maintain that he may attack the attachment for such irregularity as would have sufficed to avoid it in case no bond had been given;[3] provided he has not cut off such right by pleading the general issue.[4]

§ 305. When the liability of surety on bond to pay judgment begins.—When a bond has been given, to dissolve an attachment and release the attached property, conditioned to pay the judgment which the attachment plaintiff may procure against the attachment defendant, a party to such bond, whether he be a surety or an intervener claiming the property as his own, becomes absolutely liable after the rendition of the judgment against the attachment defendant, and for the amount

return implies an attachment of the property as the property of the defendant. Birdsall *v.* Wheeler, 58 Conn. 429, 20 Atl. Rep. 607.

1. Birdsall *v.* Wheeler, 58 Conn. 429, 20 Atl. Rep. 607.

2. Stephens *v.* Greene County Iron Co., 11 Heisk. (Tenn.) 71; Pierce *v.* Whiting, 63 Cal. 538.

3. Bates *v.* Killian, 17 S. C. 553; Lehman *v.* Berdin, 5 Dillon C. Ct. 340; Edwards *v.* Prather, 22 La. Ann. 334; Bauer *v.* Antoine, 22 La. Ann. 145; Paihles *v.* Roux, 14 La. 82; Quine *v.* Mayes, 2 Rob. (La.) 510; Garbutt *v.* Hanff, 15 Abb. (N. Y.) Pr. 189; Claflin *v.* Baere, 57 How. (N. Y.) Pr. 78.

4. Myers *v.* Perry, 1 La. Ann. 372; Brinegar *v.* Griffin, 2 La. Ann. 154; Savage *v.* Voorhies, 13 La. Ann. 549.

recovered by the plaintiff in such judgment.[1] The liability of the surety on such bond accrues on the rendition of the judgment without the issuance of an execution.[2] And this is true although the defendant may have died pending suit and final judgment be entered therein against the administrator, because, the bond being statutory, a judgment against the administrator is, within the meaning of the bond, a judgment against the original defendant.[3] And where under a special statute, as in California, the sureties become liable immediately and without demand or notice whenever the principal has made default, the attachment plaintiff may sue the sureties without even waiting for the expiration of the day on which demand for payment was made upon the defendant and by him refused.[4]

While it is true that the engagement of the sureties on a bond to dissolve an attachment will be strictly construed, yet when they have covenanted to pay any judgment which may be secured against "the defendants" in the action, the covenant will not be so strictly interpreted as to discharge them from liability when a judgment is secured against one of the defendants alone.[5] Likewise a bond conditioned for the payment of "the amount, if any, which the plaintiff shall recover in the action" will bind the sureties although the action be dismissed as to one of the defendants and judgment rendered against the others.[6] The security required by the statute is a security for

1. Ferguson *v.* Glidewell, 48 Ark. 195, 2 S. W. Rep. 711; Painter *v.* Gibson, (Iowa) 55 N. W. Rep. 84; Wright *v.* Oakey, 16 La. Ann. 125.

The intervener, by intervening and bonding property attached, releases it from the lien of the attachment and removes it from the jurisdiction of the court, and he becomes consequently bound as surety for whatever judgment may be rendered against the defendant. Ledda *v.* Maumus, 17 La. Ann. 314.

Where such an intervener sells the property for more than the amount of the attachment creditor's debt and then withdraws his claim, he is liable to the creditor for the amount of the debt. Tift *v.* Keaton, 78 Ga. 235, 2 S. E. Rep. 690.

2. Lincoln *v.* Beebe, 11 Ark. 697; Weed *v.* Dills, 34 Mo. 483; Campbell *v.* Brown, 121 Mass. 516.

3. Sharpe *v.* W. J. Morgan Co., 44 Ill. App. 346, 33 N. E. Rep. 22; Gass v. Smith, 6 Gray (Mass.) 112.

4. Gardner *v.* Donnelly, 86 Cal. 367, 24 Pac. Rep. 1072.

5. Gilmore *v.* Crowell, 67 Barb. (N. Y.) 62.

6. Poole *v.* Dyer, 123 Mass. 363; Heyneman *v.* Eder, 17 Cal. 434.

the satisfaction of any judgment that may be recovered.[1] This rule applies where the bond has been given jointly by all the defendants,[2] when the condition for payment in such bond is not restricted to a judgment against all the obligors jointly.[3] And applies to a bond given for the release of property owned jointly by the defendants, although executed by only one of them who afterwards obtains judgment in his favor, and a judgment be entered against the other by default. However, in one case where a husband and wife were made defendants in an attachment suit and the wife gave a bond for the release of the property and the suit was afterwards dismissed as to her, and judgment entered against the husband on the ground that the property was his alone, it was held that the sureties on the bond given by the wife were not liable for the payment of such judgment.[5]

When a bond has been given to release the attached property and the attachment has not been dissolved, the sureties on the bond are nevertheless bound to pay a personal judgment properly rendered against the defendant in the suit to the extent of the value of the attached property, although there be no express mention in the judgment of a lien upon the property attached.[6]

When the defendant in attachment is personally served within the jurisdiction of the court and a personal judgment is rendered against him, the sureties on the bond given to dissolve the attachment become immediately liable, although such judgment be taken by default. If the defendant, after giving a bond to dissolve the attachment, files his answer, it is an appearance, and though the answer be afterwards stricken out and judgment be entered against him for want of an answer, the liability of the sureties on the bond is fixed.[7] But when

1. Heyneman *v.* Eder, 17 Cal. 434.
2. Dalton *v.* Barnard, 150 Mass. 473, 23 N. E. Rep. 218.
3. Leonard *v.* Speidel, 104 Mass. 356.
4. Campbell *v.* Brown, 121 Mass. 516.
5. Jaycox *v.* Chapman, 10 Ben. (U. S. Dist. of N. Y.) 517.
6. Love *v.* Voorhies, 13 La. Ann. 549.
7. Jewett *v.* Crane, 35 Barb. (N. Y.) 208.

the defendant has neither been summoned nor appeared in person or by attorney, nor had notice of the proceedings, a judgment entered against him is *coram non judice* and void, and no recovery can be had upon the bond.[1]

§ 306. **What will discharge the surety on the bond to pay the judgment.**—The payment of the judgment rendered will, of course, satisfy the purpose for which the bond was given and will discharge the sureties.[2] In fact, anything which operates to defeat the judgment (as for example the bankruptcy of the defendant) will release the sureties.[3] But the stay of execution for a certain time will not have the effect to discharge the sureties, even when the judgment in the attachment suit is entered by consent and the execution stayed by stipulation between the parties to the attachment suit;[4] nor did an agreement of the plaintiff to stay the execution in the attachment suit a certain number of days provided the defendant would pay half of the judgment within a certain number of days, where it did not appear that the condition was complied with so as to make the agreement binding on the plaintiff.[5]

The dissolution of the attachment by the court discharges the bond given for the payment of the judgment in the attachment, and though the plaintiff thereafter prosecute the action to judgment, he can not sue on the bond.[6]

On the principal of suretyship, that anything which works a change of the liability of the principal discharges the surety if effected without his consent, the amendment of an attachment writ, after its entry in court, by discontinuing it as to one defendant and summoning another, if done without notice to the surety on a bond to dissolve the attachment, will release him

1. Clark *v.* Bryan, 16 Md. 171.

2. But where the attachment defendant merely deposits the amount of the judgment against him with the clerk, it is not such a payment of the judgment in the suit as will entitle him to a release of the attached property. Sagely *v.* Livermore, 45 Cal. 613. And by analogy it would seem that such a deposit would not release the sureties on the bond given for the release of the property.

3. Wolf *v.* Stix, 99 U. S. 1.

4. Preston *v.* Hood, 64 Cal. 405.

5. Seawell *v.* Cohn, 2 Nev. 308.

6. Fernau *v.* Butcher, 113 Pa. St. 292; McQueen *v.* Ship Russell, 1 Cal. 165.

from liability on such bond.[1] Likewise the amendment of a declaration so as to increase the liability of the principal in the bond will discharge the surety.[2]

The sureties on a bond given for the release of attached property are for all purposes like bail, and if they desire to be released from their obligation they may surrender the property in discharge of the bond, if it can be returned in the condition which it was when the bond was given.[3]

The sureties on the bond given for the release of attached property are not discharged by the giving of a bond on appeal taken from the judgment rendered against the attachment defendant. And a surety on both bonds is liable on both, but in all only for the amount for which his principal is in default on the judgment against him.[4]

§ 307. **Action on the bond to pay judgment—(a) Generally.** —An action upon the bond given for the release of attached property and the dissolution of the attachment, is, in general, governed by the same rules as appertain to the bringing of an action upon a bond to deliver property, and for that reason reference is here made to what has been stated regarding such action.[5] And yet the two bonds are so unlike in their conditions that special rules applicable to an action upon a bond to pay the judgment will be here separately stated. While no execution need issue on the judgment rendered before bringing an action against the obligors in a bond containing a cove-

1. Tucker *v.* White, 5 Allen (Mass.) 322; Richards *v.* Storer, 114 Mass. 101.

But a contrary rule was applied in New York, where the defendant, added by amendment, was a *partner* to the defendants in the original suit. Christal *v.* Kelly, 24 Hun (N. Y.) 155; Higgins *v.* Healy, 47 N. Y. Supr. Ct. 207. See *ante*, § 292, as to the dismissal only of a defendant.

2. Prince *v.* Clark, 127 Mass. 599.

But the adding of a count making a claim for personal injuries to a declaration which set out that the plaintiff "was damaged to (a certain extent) and otherwise" was held not to introduce a new cause of action, and not to release the sureties on a bond given to dissolve the attachment. Doran *v.* Cohen, 147 Mass. 342, 17 N. E. Rep. 647.

3. Hightour *v.* Murray, 1 Hayw. (N. C.) 21; Schuyler *v.* Sylvester, 4 Dutcher (N. J. L.) 487. But see Dorr *v.* Kershaw, 18 La. 57.

4. State *v.* McGlothlin, 61 Iowa 312.

5. See *ante*, § 294, *et seq.*

nant to pay such judgment,[1] yet the necessity of a demand upon them for such payment should be made, and this is especially obligatory when the statute provides that such bond shall be conditioned to pay the judgment on demand.[2]

A special statute enabling the plaintiff, who procures a judgment against the defendant in attachment, to proceed against the sureties on the release bond by rule, does not, in Louisiana, dispense with the necessity of bringing an action against an intervener who is the principal on such bond. The statute restricts that remedy to the surety and does not contemplate charging the principal in that way.[3]

It is not necessary that the plaintiff be in possession of the bond when he brings his action upon it. If the plaintiff is the legal owner of it and can produce it at the trial it is enough, although it is in the custody of the clerk of the court when the action was commenced.[4]

The fact that the bond for the dissolution of an attachment may have been given to discharge the property attached in two different suits will not effect the bringing of an action on such bond where no judgments had been rendered in one of them. The recital of the other attachment will be stricken out as surplusage.[5]

§ 308. (b) **Form of the action.**—The amount for which a judgment is rendered against the attachment defendant fixes the amount to be paid by the obligors on the bond, and then an action upon such bond comes within statutory provisions relating to the recovery of liquidated damages.[6] An action of "debt"

1. See *ante*, § 296.

2. But it has been held in Colorado that a bond conditioned that "defendant will, on demand, pay the plaintiff the amount of any judgment that may be recovered against the defendant if the attachment be *dissolved and discharged*," can not be enforced as a statutory obligation; because a statutory obligation only becomes effective when the attachment is *sustained*. And it could not be enforced as a common-law obligation in this cause because the condition upon which it was executed—the discharge of the attachment—was not complied with. Edwards *v.* Pomeroy, (Colo.) 6 West. Coast Rep. 514.

3. Ledda *v.* Maumus, 17 La. Ann. 314.

4. Bowers *v.* Beck, 2 Nev. 139.

5. Hanness *v.* Smith, 22 N. J. L. (2 Zab.) 332.

6. McAlister *v.* Eichengreen, 34 Md. 54.

will lie on such a recognizance entered into in open court, even though the parties may not have signed it.[1]

§ 309. (c) **Parties to the action.**—Where the plaintiff himself is not the obligee in the bond given for the payment of the judgment and the release of the attached property,—as where the bond runs to the sheriff,—the bond may be assigned to the plaintiff in the attachment, and the action thereon brought by him.[2] Furthermore, the obligors on the bond will be liable to one who has been made assignee for the benefit of creditors and who having been substituted as plaintiff has recovered judgment.[3]

Where a bond is given to several attaching creditors conditioned to pay each creditor the amount due him; under a statute which provides that the bond shall be held to the common benefit of all the creditors, and may be prosecuted by all of them jointly or by any one of them separately, a single creditor may in his own name maintain an action on the bond.[4]

An action on a bond to dissolve an attachment, in which bond the clerical error was made by substituting the name of the plaintiff for that of the defendant, an action was nevertheless sustained against the defendant and sureties.[5]

§ 310. (d) **Plaintiff's pleading and proof in the action.**—The plaintiff in an action on the bond, conditioned for the payment of the judgment, given to obtain the release of attached property must aver in his declaration or complaint all that may be necessary for him to prove in order to show a cause of action against the obligors in the bond and the extent of their liability on which the recovery is sought. A number of cases, however, hold that in an action on a bond for the release of attached property, no consideration need be averred or

1. Eimer *v.* Richards, 25 Ill. 260.

2. Carpenter *v.* Hoyt, 17 Ill. 529; Besley *v.* Palmer, 1 Hill (N. Y.) 482.

In Michigan the plaintiff may acquire such assignment as a matter of right. Dorr *v.* Clark, 7 Mich. 310.

3. Slosson *v.* Ferguson, 31 Minn. 448.

4. Pearce *v.* Hitchcock, 2 N. Y. (2 Comst.) 388.

5. Leonard *v.* Speidel, 104 Mass. 356.

proved, the release of the attachment being a sufficient consideration.[1] In California the averment of the levy is sufficient without any averment of the previous proceedings.[2] It is there necessary to state also that the property was released on the execution and delivery of the bond, it being necessary, in order to charge the obligors, to state the consideration of the undertaking, and a mere reference to the condition of the bond wherein such release is stated as a consideration is insufficient.[3] The averment of the levy, however, is sufficient; the previous proceedings need not be set forth.

In an action on the bond given to dissolve an attachment it is not necessary for the plaintiff to show that the original action was one in which an attachment might be issued according to the statute.[4] The bond being in a form which was good at common law independent of a statute, it was held to be unnecessary for the plaintiff to aver and prove that the debtor was a non-resident when such bond had been given to dissolve an attachment made under a statute authorizing an attachment of the property of a non-resident.[5]

If the name of the plaintiff has, by clerical error, been substituted for that of the defendant, the averment and proof in an action on such bond may be made against the defendant, and it will not be held to be a fatal variance in the declaration.[6] There must be evidence introduced sufficient to rebut the presumption that the one surety expected of the principals to be bound, or to show that he may have recourse against them if he pays the amount, or else he will not be bound to pay.[7]

1. See *ante*, §§ 287 and 303.

2. McMillan *v.* Dana, 18 Cal. 339.

3. Palmer *v.* Melvin, 6 Cal. 651; Williamson *v.* Blattan, 9 Cal. 500.

4. Kanouse *v.* Dormedy, 3 Denio (N. Y. Sup. Ct.) 567.

5. Kanouse *v.* Dormedy, 3 Denio (N. Y.) 567.

And it is inadmissible to prove in defense of such an action that the defendant in the original action was not in fact a non-resident when the attachment issued. Higgins *v.* Healy, 47 N. Y. Sup. Ct. (15 J. & S.)207.

6. Leonard *v.* Speidel, 104 Mass. 356.

7. Clements *v.* Cassilly, 4 La. Ann. 380.

Where A signed a bond as one of two sureties and was told by the magistrate that he would not be sufficient and the magistrate did not then approve the bond, but after an additional surety was obtained the

There must be proof of a breach in the condition of the bond. Therefore in a case where interveners gave a bond to satisfy any judgments that should be rendered against *them*, it was held that the plaintiff could not show a breach of the condition unless he showed a judgment against *them*.[1]

§ 311. (e) **Defense to the action.**—In an action against the obligors on a bond given to procure the discharge of an attachment, conditioned to pay the judgment which may be rendered against the defendant in the attachment suit, an obligor may contest the original liability on the bond or show a discharge from its obligation. But he can not interpose matters of defense to contest the liability of the attachment defendant to the claim made by the plaintiff in the attachment suit. The surety is sponsor for his principal; and if the principal has neglected to take advantage of such matters in the attachment suit, the surety is bound by the judgment.[2] It is self-evident that he can not set up in defense any matter which is waived by the giving of the bond as hereinbefore indicated[3]. Therefore, he can not show that the proceedings were wrongful and oppressive or that the attachment defendant did not owe the debt for which the attachment issued;[4] nor can he object to the amount of the recovery in the original attachment;[5] nor can he deny

bond was approved, A was held to be liable in an action on such bond. Sampson *v.* Barnard, 98 Mass. 359.

1. Yale *v.* Hoopes, 16 La. Ann. 311.

2. Atkinson *v.* Foxworth, 53 Miss. 733.

3. See *ante*, § 304.

In an action on a bond for the discharge of a person attached (which bond is analagous to a bond given for the release of attached property) it was held that that the surety could not set up any irregularity in the process on which the attachment was made; that such a defense belonged to the principal alone; that it was in his power to waive it and that the giving of bail to discharge the attachment was evidence that he did waive it. Kelly *v.* McCormick, 28 N. Y. 318.

Irregularities in making the attachment will be waived by the defendant giving bond for the release of the attached property and the plaintiff voluntarily consenting to dissolve the attachment. Bunneman *v.* Wagner, 16 Ore. 433, 18 Pac. Rep. 841.

4. Hoshaw *v.* Hoshaw, 8 Blackf. (Ind.) 258.

Unless the allegations in the plaintiff's declaration showed that his proceedings was *ex parte*. Hoshaw *v.* Hoshaw, 8 Blackf. (Ind.) 258.

5. Morange *v.* Edwards, 1 E. D. Smith (N. Y.) 414.

the non-residence of the attachment defendant.[1] The recitals in a bond are conclusive as between the parties, and a surety can not show that the property attached did not belong to the attachment defendant.[2]

That the surety was induced to sign the bond through the fraud of the defendant in the attachment is no defense to an action on the release bond brought by the attachment plaintiff, unless such plaintiff was privy thereto.[3]

In an action on the bond to dissolve an attachment, a plea of *non est factum*, with notice of the special matter, that an appeal bond had been taken and allowed in the supreme court, will not be available unless it also alleges that the appeal is still pending.[4]

§ 312. (f) **Damages in an action on bond to pay judgment.** —When the bond given for the release of attached property is a statutory bond, the judgment to be recovered in an action thereon will be determined by the extent of the obligation imposed by the statute upon the sureties in such bond, the sureties thereon are only bound according to the terms and conditions of their undertaking.[5]

It has been said that if a partner's interest in property has been attached, and the other partners obtained a delivery of the property to them by giving a bond conditioned to abide the judgment of the court, their liability in an action on such bond does not exceed the interest of the attachment defendant in the property attached.[6]

In an action on a bond given under a statute providing for the giving of such a bond and sureties, in substitution for the attached property, conditioned that the obligors pay the judgment that may be recovered, or the actual value of the interest of the defendant in the attached property, the measure of

1. Haggart *v.* Morgan, 5 N. Y. 422; Higgins *v.* Healy, 47 N. Y. Supr. Ct. (15 J. & S.) 207.
2. Pierce *v.* Whiting, 63 Cal. 538.
3. Kelly *v.* Christal, 16 Hun (N. Y.) 242.
4. Poteet *v.* Boyd, 10 Mo. 160.
5. Dawson *v.* Morton, 22 La. Ann. 535.
6. Nancarrow *v.* Young, 6 Martin (La.) 662.

damages was held to be the value of the property at the time the bond was given, and not the value of the property at the time of the judgment, or at the time demand was made.[1] And under a statute permitting the defendant, in an action on a bond given to dissolve an attachment, to show that the interest of the principal in the property attached was, at the time of giving the bond, of less value than the amount ordered to be attached, and providing that the burden of proving the value of such interest shall rest upon the defendant, the court presumed in the absence of evidence, that the value of the principal's interest at the time the bond was given was the amount ordered by the writ, and that this was its value at the date of the attachment. Judgment was then rendered against the obligors on the bond for such amount.[2]

If a certain sum be named in the bond as the penalty thereon, such sum will be the maximum amount of any judgment, which may be recovered in an action on such bond, the rule in this regard being the same as that governing the recovery on delivery bonds.[3] In an action upon a bond which was given to secure the discharge of attached property conditioned that the obligors would pay one thousand dollars if the plaintiff should recover, and that they would pay the same on demand, together with the costs which might be recovered against the attachment defendants therein not exceeding two hundred and fifty dollars, the limitation of two hundred and fifty dollars was held to be applied only to costs.[4]

1. Perry *v.* Post, 45 Conn. 354.

In an action of trover, the measure of damages is the value of the property at the time it was "found" or converted. But in an action on an attachment bond evidence of the finding is inadmissible, for the obligation of the bond is to pay the value of the property at the time of the attachment and not at the time of the conversion, which, in this case, was four months previous to the attachment. Trubee *v.* Wheeler, 53 Conn. 458.

The rule in this regard differs from the rule of the assessment of damages on a bond to return the attached property. See *ante*, § 301.

2. Birdsall *v.* Wheeler, 58 Conn. 429, 20 Atl. Rep. 607.

3. See *ante*, § 301.

4. Billingsley *v.* Harris, 79 Wis. 103, 48 N. W. Rep. 108.

CHAPTER XIV.

THE LIEN CREATED BY ATTACHMENT.

§ 313. Generally.
314. No lien is created until a levy is made.
315. The same rule applies to real estate.
316. The lien extends only to property levied upon.
317. The lien limited to the amount specified in the affidavit and writ.
318. The lien can not be superior to the debtor's right in the property at the time of the levy.
319. The lien is not affected by subsequent alienation of the attached property.
320. The lien a sufficient interest to contest a fraudulent judgment or conveyance.
321. The lien may be protected by removing adverse claims.
322. The lien can be destroyed only by a dissolution of the attachment.
323. The lien is merged into a judgment for the plaintiff.
324. The lien is continued when an appeal is taken from a judgment for the defendant.
325. To protect the lien a demand on the judgment must be made.

§ 313. Generally.—The purpose of an attachment is to create, for the benefit of a creditor, a lien upon the property or effects of a debtor who is beyond the reach of ordinary legal process or who has shown a disposition to avoid the payment of his debt, to the fraud and injury of his creditor.[1] The lien which the plaintiff acquires by means of a legal attachment[2] is as specific as if created by the voluntary act of the debtor, and stands on as high equitable grounds as a mortgage lien; but instead of being regarded as an absolute vested right in specific property, it is considered more in the nature of a pledge, liable to answer that particular demand of the plaintiff under certain conditions and on the happening of certain contingencies. It is

1. See more particularly "Purpose of Attachment," *ante*, § 10, and "Grounds for Attachment," *ante*, § 86.

2. No lien is created by an illegal attachment. Gardner *v.* Hust, 2 Rich. L. (S. C.) 601.

only an inchoate or qualified lien which may become perfected by being merged into the judgment thereafter obtained in the suit, and it may be defeated by a dissolution of the attachment.[1] The attaching creditor acquires no property, neither general nor special, in either realty or personalty by his attachment. The title remains in the debtor, not only until the attachment lien is merged into a judgment condemning the property, but until a sale is made thereof.[2] The only right the plaintiff acquires under his attachment levy is to use such measures as may be necessary to preserve his security until he can reduce his demand to a judgment.[3] He can not interfere with the claims of third persons.[4] He has no right of possession and will have no right of action against one who takes the attached chattels from the possession of the attaching officer.[5] While the attachment proceedings are pending, the officer controls the property and the plaintiff controls only the lien.[6]

§ 314. No lien is created until a levy is made.—Unless there be a special statute to the contrary, the mere issuance of an attachment, and placing it in the hands of the officer whose

1. Hannahs *v.* Felt, 15 Iowa 141; Goore *v.* McDaniel, 1 McCord (S. C.) 480; Peck *v.* Webber, 7 How. (Miss.) 658; Smith *v.* Bradstreet, 16 Pick. (Mass.) 264; People *v.* Cameron, 7 Ill. 468; Lyon *v.* Sandford, 5 Conn. 544; Hervey *v.* Champion, 11 Humph. (Tenn.) 568.

2. Davidson *v.* Beatty, 3 Har. & M. (Md.) 594; Owings *v.* Norwood, 2 Har. & J. (Md.) 96; Snell *v.* Allen, 1 Swan (Tenn.) 208; Atkins *v.* Swope, 38 Ark. 528; Goddard *v.* Perkins, 9 N. H. 488; Austin *v.* Wade, 3 N. J. L. (2 Penn.) 727, (551); Ludden *v.* Leavitt, 9 Mass. 104; Dillenback *v.* Jerome, 7 Cow. (N. Y.) 294; Fettyplace *v.* Dutch, 13 Pick. (Mass.) 388.

3. Tennent *v.* Battey, 18 Kan. 324.

In garnishment, the creditor acquires a lien on the debt so far as to restrain the garnishee from paying it over to the original creditor, but no further. Parker *v.* Farr, 2 Browne (Pa.) 331.

4. Parker *v.* Farr, 2 Browne (Pa.) 331.

5. Dobbins *v.* Hanchett, 20 Ill. App. 396; Richardson *v.* Reed, 4 Gray (Mass.) 441; Blatchford *v.* Boyden, 18 Ill. App. 378.

The officer, by making a levy upon chattels, acquires a special property therein only defeasible by the failure of the plaintiff to maintain his action or by his not suing out and levying his execution within the time required by the statute therefor, after the recovery of his judgment. This special property and right of possession possessed by the sheriff gives to *him* the right of action against any third person who interferes therewith. Blatchford *v.* Boyden, 18 Ill. App. 378; Johnson *v.* Edson, 2 Aik. (Vt.) 299.

6. Braley *v.* French, 28 Vt. 546.

duty it is to serve it, will create no lien.[1] The lien is created by the actual levy.[2] The attaching creditor acquires no rights in the debtor's property under a writ of attachment until the levy is made.[3] Consequently the plaintiff whose attachment is first levied acquires the prior lien, even though another creditor's writ was previously issued and earlier placed in the hands of the officer.[4] And if a mortgage on the property be executed while the writ is in the hands of the officer and before a levy is made the mortgage lien will be superior to a lien acquired by an after levy.[5] Likewise property sold between the issuance and levy of an attachment writ can not be bound by a levy thereafter made.[6] The lien is created by the levy and fixed by

1. May *v.* Buckhannon R. L. Co., 70 Md. 448, 17 Atl. Rep. 274; Crocker *v.* Radcliffe, 3 Brev. (S. C.) 23; Mears *v.* Winslow, 1 Smedes & M. Chy. (Miss.) 449.

By the Arkansas code (1871) an order of attachment becomes a lien upon personal property in the county and which might be seized under an execution from the time of the delivery of the order to the officer. Therefore, one who purchases the property from the debtor thereafter, even though before the levy, will take it subject to the lien. The rule, however, is otherwise in regard to debts attached by garnishment. Bergman *v.* Sells, 39 Ark. 97.

By the Kentucky statute (1838) the lien was fixed upon the property sought to be subjected thereto by the filing of the bill and the service of process *without* an actual levy of the attachment, for under that statute the attachment levy was only to prevent the removal of property. Milward *v.* Cochran, 7 B. Mon. (Ky.) 344.

By a Virginia statute which permitted attachments in chancery the indorsement by the clerk of the chancery court that the action was brought to attach the effects of the attachment defendant, was sufficient to restrain the application of them to other use until the attachment plaintiff's demand was satisfied. McKim *v.* Fulton, 6 Call (Va.) 106.

2. Taffts *v.* Manlove, 14 Cal. 47; Kuhn *v.* Graves, 9 Iowa 303; Coffin *v.* Ray, 1 Metc. (Mass.) 212; Sharp *v.* Hunter, 7 Coldw. (Tenn.) 389; Williamson *v.* Bowie, 6 Munf. (Va.) 176; Pond *v.* Griffin, 1 Ala. 678; Martin *v.* Dryden, 6 Ill. (1 Gilm.) 187; Mears *v.* Winslow, 1 Smedes & M. (Miss.) Ch. 449; Redus *v.* Wafford, 12 Miss. (4 Smedes & M.) 579; Lummis *v.* Boon, 3 N. J. L. (2 Pen.) 305; Burkhardt *v.* Sanford, 7 How. (N. Y.) Pr. 329; Vinson *v.* Huddleston, Cooke (Tenn.) 254; Russell *v.* Lawton, 14 Wis. 202; Schacklett & Glyde's Appeal, 14 Pa. St. 326.

3. McIntosh *v.* Smiley, 32 Mo. App. 125.

4. Crowninshield *v.* Strobel, 2 Brev. (S. C.) 80; May *v.* Buckhannon River Lumber Co., 70 Md. 448, 17 Atl. Rep. 274.

5. Gray *v.* Patton, 13 Bush (Ky.) 625.

6. Hunt *v.* Strew, 39 Mich. 368; Rodgers *v.* Borner, 45 N. Y. 379.

the judgment.[1] The moment a lawful levy is made a valid charge is in existence against the property, and when a sale is made under execution issued upon the judgment obtained in the attachment, the title relates back to the date of the levy. And even a statute passed after the levy and before the sale has no effect upon the lien,[2] except when such statute repeals the act under which the suit was being prosecuted without authorizing the continuance of pending actions, in which case, it seems, the attachment is dissolved by force of the statute.[3]

Although an attachment writ may have been groundlessly issued the lien created by the levy will nevertheless be operative until the attachment is dissolved by regular proceedings.[4]

§ 315. **The same rule applies to real estate.**—In the attachment of real estate also, it is not the issuance of the writ, but the actual levy of the attachment which creates the lien; and after a judgment for the plaintiff and condemnation of the land to the satisfaction of the plaintiff's demand, the lien thus perfected relates back to the time of its levy.[5] But in the attachment of land the officer can not make an actual manual seizure thereof as he is required to do in the attachment of chattels, hence, the important question to be determined is, what constitutes a levy upon real estate and when is it perfected? This has already been considered at some length,[6] and it is only needful here to state that the controlling statute must be strictly followed in this regard, and that the many statutes are

1. Ensworth *v.* King, 50 Mo. 477.

2. Hall *v.* Stephens, 65 Mo. 670; Hannahs *v.* Felt, 15 Iowa 141.

3. Stephenson *v.* Doe, 8 Blackf. (Ind.) 508.

4. Bittick *v.* Wilkins, 7 Heisk. (Tenn.) 307; and see "Dissolution of Attachment," *post*, § 326.

5. Redus *v.* Wofford, 4 Smed. & M. (Miss.) 579; Walton *v.* Cope, 3 Tex. Civ. App. 499, 22 S. W. Rep. 765; Robertson *v.* Kinkhead, 26 Wis. 560; Burkhardt *v.* McClellan, 15 Abb. (N. Y.) Pr. 243, note.

If the debtor marry after the levy and die before judgment, his widow will have no right of dower as against such attachment. Brown *v.* Williams, 31 Me. 403.

When a valid attachment is made upon land which thereafter becomes the homestead of the defendant in the attachment, the homestead right is subject and subordinate to the attachment lien. Robinson *v.* Wilson, 15 Kan. 595.

6. See *ante*, § 214.

too dissimilar to receive general treatment in a work like this. For example, however, many statutes prescribe the filing of a certificate of the attaching officer, in the office of the recorder or register of deeds of the county where the land is situate, which must show in general the names of the parties, the amount of the debt, the date of the levy and a description of the land sought to be charged.[1] Under a Texas statute, a sufficient levy was made on land by indorsing the levy on the writ, and the lien attached as of the time of such indorsement; and acts in going upon the land before such indorsement had no effect in creating the lien,[2] nor did a delay in filing the return until after a term of court had passed affect the lien acquired by the indorsement when no rights of third parties intervened.[3] But under a statute in New Jersey the officer was required not only to go to the house or lands of the defendant and then and there declare, in the presence of one credible person at least, that he attached the lands of the defendant at the suit of the plaintiff, but he must also make an inventory and appraisement of the real property before any lien was created.[4] A late statute in Georgia prescribes the keeping of a county attachment docket, and no lien is there created upon real estate as against third parties unless the attachment suit is docketed within five days after the levy of the attachment.[5] When the levy is made the lien has attached and its validity will not be affected by the omission of an officer or clerk to make other entries required by the statute which are no part of the levy. For example the failure of the prothonotary to enter the names

1. Adams *v.* Boulware, 1 Neb. 470; Davis Sewing Machine Co. *v.* Whitney, 61 Mich. 518, 28 N. W. Rep. 674; Stanton *v.* Boschert, 104 Mo. 393, 16 S. W. Rep. 393; Hall *v.* Gould, 79 Ill. 16; Shaw *v.* O'Brien, 69 Me. 501.

The statute of Maine also requires in order to create a lien upon the real estate that the amount of the plaintiff's demand be set forth in proper counts, or a specification thereof be annexed. As to what is compliance therewith, see Everett *v.* Carleton, 85 Me. 397, 27 Atl. Rep. 265; Gilman *v.* Carleton, 85 Me. 397, 27 Atl. Rep. 265; Briggs *v.* Hodgdon, 78 Me. 514, 7 Atl. Rep. 387; Hanson *v.* Dow, 51 Me. 165.

2. Riordan *v.* Britton, (Tex.) 7 S. W. Rep. 50.

3. City Bank *v.* Cupp, 59 Tex. 268.

4. Tomlinson *v.* Stiles, 4 Dutcher (N. J. L.) 201.

5. Act Dec. 20, 1890 (Acts 1890-91, No. 73, p. 208).

of the parties, etc., on the docket as required by statute in Pennsylvania, was held not to effect the validity of the lien even as against a subsequent mortgagee without notice.[1]

When land is held by tenants in common, and an attachment is levied upon the interest of one of them, and pending the attachment suit the estate is changed by partition from a tenancy in common to property held in severalty, the lien created follows the estate of the defendant and holds his separate estate.[2]

§ 316. **The lien extends only to property levied upon.**—The lien created by an attachment is not a lien on all the defendant's property, but only on that which has been actually levied upon.[3] And this rule applies as well to attachments on land.[4] Therefore, when one tract has been attached it is not even within the power of the court to substitute a different tract to the operation of the attachment.[5] And where personal property attached is lost during litigation—as by the insolvency of the officer in whose custody it was, and of his sureties—the creditor can not afterwards enforce his demand as against other property of the debtor.[6] Furthermore, a judgment thereon being the perfection of the lien, it does not become a general lien thereby, but (in the absence of personal service or appearance) becomes a specific appropriation of the property itself to the satisfaction of that particular judgment.[7]

Whether or not the rents and profits accruing upon the attached property are subject to the attachment lien can not be

1. McLaughlin *v.* Phillips, (Pa. Com. Pl.) 10 Pa. Co. Ct. R. 382.

2. Crosby *v.* Allyn, 5 Me. (5 Greenl.) 453; Taylor *v.* Mixter, 11 Pick. (Mass.) 341.

3. Learned *v.* Vandenburgh, 8 How. (N. Y.) Pr. 77; 7 How. (N. Y.) Pr. 379; Parker *v.* Parker, 2 Hill's (S. C.) Ch'y 35; Parker *v.* Farr, 2 Browne (Pa.) 331.

4. Fitzgerald *v.* Blake, 42 Barb. (N. Y.) 513; Herzberg *v.* Warfield, 76 (Md. 446) 25 Atl. Rep. 664.

5. Steinmetz *v.* Nixon, 3 Yeates (Pa.) 285.

6. Kenrick *v.* Huff, 71 Mo. 570.

7. Tyrell *v.* Rountree, 7 Peters, 464.

In Kentucky the service of the attachment upon a railway company creates no lien on property not within the jurisdiction of the court at the time of the service upon the company. Sutherland *v.* Peoria Bank, 78 Ky. 250.

said to be judicially ascertained. For while after declared dividends upon attached shares of stock have been held to be bound as much as the *corpus* of the stock,[1] it has been held on the contrary, in an action upon a money bond, that the lien did not affect installments thereafter becoming due, but only the amount actually due upon the bond at the time of the attachment.[2] And while it has been held in one case that the attaching creditor on real estate is not entitled to the rents accruing to his debtor,[3] yet in another case the rents collected pending the attachment, by a receiver appointed in the attachment suit, have been adjudged to be subject to the lien of the attaching creditor.[4]

§ 317. **The lien limited to the amount specified in the affidavit and writ.**—The lien acquired by the levying of an attachment can not, as against other creditors of the defendant, be for a greater sum of money than is specified in the affidavit and writ.[5] And if a judgment be entered for a greater sum the entire lien will be thereby discharged.[6] But where, by mere clerical error in the statement of the amount in the original complaint or affidavit, an amendment is rendered necessary to increase the amount, the amendment thereof making such increase will not prevent the larger demand from taking precedence over an attachment brought in the meantime.[7] As between the plaintiff and defendant alone, however, the lien created by attachment on real property is not limited to the amount the officer was, in the writ, commanded to attach, but extends to the amount of the judgment and costs when the same is greater than the amount named in the precept of the writ.[8]

1. Jacobus *v.* Monongahela Nat. Bank, 35 Fed. Rep. 395.

2. Syracuse City Bank *v.* Coville, 19 How. (N. Y.) Pr. 385.

3. Columbia Bank *v.* Ingersol, 1 N. Y. S. 54.

4. Young *v.* Hail, 6 Lea (Tenn.) 179.

5. Tilton *v.* Cofield, 2 Col. 392; Tunnison *v.* Field, 21 Ill. 108; Austin *v.* Burgett, 10 Iowa 302.

6. Hale *v.* Chandler, 3 Mich. 531; Freeman *v.* Creech, 112 Mass. 180; Willis *v.* Crooker, 1 Pick. (Mass.) 204; Fairfield *v.* Baldwin, 12 Pick. (Mass.) 388; Lutterloh *v.* McIlhenny Co., 74 Tex. 73; Parks *v.* Young, 75 Tex. 278. See further, "Fraudulent Attachments," *post*, § 410.

7. Suksdorff *v.* Bigham, 13 Oregon 369, 12 Pac. Rep. 818.

8. Searle *v.* Preston, 33 Me. 214. A lien created by the attachment of

§ 318. **The lien can not be superior to the debtor's right in the property at the time of the levy.**—A creditor can not, by attachment, acquire any higher or better right in the property attached than the debtor himself had at the time the attachment was levied, unless he can show that there has been fraud or collusion to his detriment.[1] The lien obtained by attachment is subject to all previous liens by *bona fide* creditors, therefore the effect of the attachment is to subject only the interest which the defendant has in the property at the time of its seizure. It affects no higher or superior rights or subsequently acquired interests.[2] When the record does not show any title in him whose real estate is sought to be attached, and the attaching creditor does not know that the debtor has any such title, the fiction under which the attachment debtor is deemed to be a *bona fide* purchaser can not be extended so as give him more than the debtor did in fact own.[3] Where the personal property is attached in the hands of another than the attachment defendant, the attaching creditor is charged with notice of the rights of the person in possession, and therefore can not acquire any right in the property other than he had at the time of the attachment.[4] If the payee of several notes assign all but one of them and it be attached, the attachment plaintiff can not maintain, as against the assignees of the other notes, any greater right than the assignor himself has; for between him and his assignees any off-set upon the notes will be properly imputable to the note not assigned, rather than those assigned, and the plaintiff who stands in no better position than the assignor must likewise allow the off-set to be made.[5]

an equity of redemption (the same being attachable in Maine) was not restricted to the amount of a judgment, but was extended to the whole amount paid by the purchaser with interest thereon. Gilbert *v.* Merrill, 8 Me. (8 Greenl.) 295.

1. Alexander *v.* Pollock, 72 Ala. 137; Oregon Ry. & Nav. Co. *v.* Gates, 10 Oregon, 514; Baillio *v.* Poisset, 8 Martin (La.) N. S. 336; Frazier *v.* Willcox, 4 Rob. (La.) 517.

2. Haldeman *v.* Hillsborough & Cin. R. R. Co., 2 Handy (Cin. Superior Ct.) 101; Crocker *v.* Pierce, 31 Me. 177; Fleisch *v.* St. Louis Nat. Bank of Commerce, 45 Mo. App. 225.

3. Cowley *v.* McLaughlin, 141 Mass. 181.

4. Bacon *v.* Thompson, 60 Iowa 284.

5. Newton *v.* Gray, 10 La. Ann. 67.

A creditor who attaches property obtained by fraudulent practice or misrepresentations does not acquire any better right to hold it, as against the former owner who has thus been deprived of it, than the fraudulent vendor had. The debtor having acquired no valid title, the attaching creditor acquires no valid lien.[1]

§ 319. **The lien is not affected by subsequent alienation of the attached property.**—An attachment does not change the estate of the debtor, or take away his power of alienation. The attaching creditor acquires a lien only, and the debtor may sell the attached property when he can deliver it without trespass. Such sale and delivery, either of personal or real property, will vest the title in the purchaser, subject to the attachment lien; but it gives the purchaser a title paramount to that of subsequent attaching creditors.[2] Such alienation may be by deed of assignment for the benefit of creditors,[3] by mortgage, or by absolute sale.[4] Every such transfer of interest will be subject to the prior attachment lien.[5] After an attachment has been levied upon land the defendant can not sell it even for a valuable consideration or *bona fide* to pay debts then due, so as to affect the lien created by the attachment.[6] A conveyance of the land while the attachment suit is pending will constitute no cloud upon the title, and a sale made under an execution issuing on the attachment will convey both the

1. Connor *v.* Follansbee, 59 N. H. 124; Poor *v.* Woodburn, 25 Vt. 234.

2. Griggs *v.* Banks, 59 Ala. 311; Wheeler *v.* Nichols, 32 Me. 233; Fettyplace *v.* Dutch, 13 Pick. (Mass.) 388; Denny *v.* Willard, 11 Pick. (Mass.) 519; Arnold *v.* Brown, 24 Pick. (Mass.) 89; Warner *v.* Everett, 7 B. Mon. (Ky.) 262; Calkins *v.* Lockwood, 17 Conn. 154; Bigelow *v.* Willson, 1 Pick. (Mass.) 485; Ladd *v.* North, 2 Mass. 514; Lyon *v.* Sandford, 5 Conn. 545.

3. Yates *v.* Dodge, 123 Ill. 50, 13 N. E. Rep. 847; First Nat. Bank *v.* North Alabama, etc., Co., 91 Tenn. 12, 18 S. W. Rep. 400.

4. Harvey *v.* Grymes, 8 Martin (La.) 395; Wheeler *v.* Nichols, 32 Me. 233; Starr *v.* Moore, 3 McLean 354.

Even a receiptor of goods—Denny *v.* Willard, 11 Pick. (Mass.) 519—or the attaching officer, may purchase the property subject to the attachment lien. Arnold *v.* Brown, 24 Pick. (Mass.) 89.

5. Denny *v.* Willard, 11 Pick. (Mass.) 519; Arnold *v.* Brown, 24 Pick. (Mass.) 89.

6. Ozmore *v.* Hood, 53 Ga. 114; Ward *v.* McKinzie, 33 Tex. 297.

debtor's legal and equitable title to the land, free from all encumbrances created by him subsequent to the levy of the writ of attachment.[1] The sale under the attachment will be independent of a prior sale on execution issued after levy of such attachment.[2] Even a previous verbal sale of land, confirmed by a written conveyance after the attachment levy, will not effect the lien acquired by the attachment.[3] If a creditor attach land, having no notice that the debtor had previously conveyed it, subsequent notice of that fact will not impair his lien.[4] Furthermore, a levy upon lands previously conveyed to the debtor's wife, but for which he supplied the purchase-money, was held to create a lien superior to a subsequent deed by both wife and debtor to one who had full knowledge of the attachment; a bill having been filed to set aside the conveyance as fraudulent.[5]

The levy of an attachment is a constructive notice to all subsequent purchasers, and although property is held at the time of the levy by a third person under a fraudulent conveyance from the attachment debtor and such third person has not been made a party to the attachment suit.[6]

The levy of an attachment diminishes the property of the defendant to the extent of its lien; but the first attaching creditor does not hold the property to the exclusion of subsequent attaching creditors.[7]

§ 320. The lien a sufficient interest to contest a fraudulent judgment or conveyance.—It is a well known rule of law that

1. Huxley *v.* Harrold, 62 Mo. 516; Wright *v.* Smith, 11 Neb. 341.

2. Harbison *v.* McCartney, 1 Grant (Pa.) 172.

3. White *v.* O'Bannon, 86 Ky. 93, 5 S. W. Rep. 346; Voorheis *v.* Eiting, (Ky.) 22 S. W. Rep. 80.

Nor has the purchaser a lien on the land for the purchase-money paid, superior to a lien of the attachment. Voorhies *v.* Eiting, (Ky.) 22 S. W. Rep. 80.

4. Kent *v.* Plummer, 7 Me. 464.

Even though the officer, or the plaintiff's attorney of record, may have known, at the time of making the attachment, of the prior conveyance. Stanley *v.* Perley, 5 Me. 369; Lawrence *v.* Tucker, 7 Me. 195.

5. Leathwhite *v.* Bennett, (N. J.) 11 Atl. Rep. 29.

As to the priority of the lien over unrecorded deeds and other instruments and processes, see *post*, § 412.

6. McClellan *v.* Solomon, 23 Fla. 437, 2 So. Rep. 825.

7. Smith *v.* Clinton Bridge Co., 13 Ill. App. 572.

a creditor at large can not maintain a bill in equity to set aside fraudulent obstruction to the due execution of legal process, until he has first obtained a judgment on his demand. Some courts are inclined to make an exception to this rule in favor of attaching creditors, and to hold that by virtue of an attachment levy, the lien acquired by the plaintiff is such an interest in the property as will entitle him to a standing in a chancery court to prevent a fraudulent obstruction, or have it removed. An attaching creditor, after levy and before judgment, has been permitted to maintain a creditor's bill in New Jersey,[1] New Hampshire,[2] Indiana,[3] Kentucky,[4], Texas [5] and California.[6] And an injunction to prevent the removal of the attached property from the jurisdiction of the court, and to prevent the sale under execution of the attached property, has been permitted.[7] But all courts are cautious about overruling a principle so well founded, and are slow to adopt a new rule. Among the reluctant ones who have not yet declared the exception to be the rule, may be cited the following:

Nebraska and Kansas have maintained that a creditor's bill to set aside a fraudulent conveyance can only be maintained by a judgment creditor and not by an attaching creditor before the fact that he is a creditor has been judicially determined.[8] In Missouri equitable aid was not allowed before judgment, as against executions levied on judgments confessed by the de-

1. Cocks *v.* Varney, 45 N. J. Eq. 72; Smith *v.* Muirheid, 34 N. J. Eq. 4; Curry *v.* Glass, 25 N. J. Eq. 108; Robert *v.* Hodges, 16 N. J. Eq. 108; Hunt *v.* Field, 9 N. J. L. (1 Stockton) 36; Williams *v.* Michenor, 11 N. J. Eq. (3 Stockton) 520.

2. Sheafe *v.* Sheafe, 40 N. H. 516; Stone *v.* Anderson, 26 N. H. 506; Tappan *v.* Evans, 11 N. H. 311.

3. Quarl *v.* Abbett, 102 Ind. 233.

4. Little *v.* Ragan, 83 Ky. 321; Martz *v.* Pfeifer, 80 Ky. 600; Scott *v.* McMillen, 1 Littell 302.

5. Ward *v.* McKinzie, 33 Tex. 297.

6. Scales *v.* Scott, 13 Cal. 76; Hyneman *v.* Hannenburg, 6 Cal. 376. *Contra*, McMinn *v.* Wheelan, 27 Cal. 300. The Oregon code makes an attaching creditor a *bona fide* purchaser for value. And his lien then enables him to maintain a suit in equity to set aside a fraudulent assignment of the property. Hahn *v.* Salmon, 20 Fed. Rep. 801. To the same general principle, see Lillienthal *v.* A. P. Hotaling Co., 15 Ore. 371, 16 Pac. Rep. 630.

7. Leon *v.* Schram, 58 Tex. 524; Moore *v.* Holt, 10 Gratt. (Va.) 284; Moritz *v.* Kaliske, 28 N. Y. S. 380, 31 Abb. N. C. 49. *Contra* Brooks *v.* Stone, 19 How. (N. Y.) Pr. 395; Mills *v.* Block, 30 Barb. (N. Y.) 549.

8. Weil *v.* Lankins, 3 Neb. 284; Tennent *v.* Battey, 18 Kan. 324; Eddy *v.* Weaver, 37 Kan. 540.

fendant, when the same was alleged to have been fraudulent;[1] nor where the debtor has absconded, leaving funds in a city treasury, which could not be reached by garnishment.[2] In Illinois, likewise, when no property was seized and the court held that the garnishment was not a lien on the effects in the garnishee's hands, no injunction was allowed to prevent the garnishee from disposing of the property.[3]

Without going so far as to hold that the attaching creditor may take the initiative step to remove the fraudulent obstruction before he has obtained a judgment, a greater number of courts have permitted him to sustain an attachment against the fraudulent debtor when the fraudulent vendee or assignee takes steps toward showing the property to be his and not the debtor's, averring the attachment to be wrongful.—These courts hold that if a debtor has fraudulently divested himself of his legal title, the levy of an attachment thereon by a creditor will create a lien on the property with the same effect as if the conveyance had never been made;[4] that the relation of the attaching creditor becomes changed, by his attachment levy, from that of a creditor at large to a creditor having a specific lien upon the goods attached; and that, therefore, he has a right, even before judgment, to show that prior assignments and executions issued upon judgments confessed by the debtor are fraudulent. And they further hold that the attaching officer, being a bailee of the plaintiff, has a like right.[5]

1. Martin *v.* Michael, 23 Mo. 50.

As bearing upon the same subject, see Hamilton *v.* McClelland, 45 Mo. 424.

2. Pendleton *v.* Perkins, 49 Mo. 565.

A municipal corporation can not generally be made a garnishee. See *post*, Vol. II.

3. Bigelow *v.* Andress, 31 Ill. 322.

And the New York Court of Appeals has maintained that a sheriff has no standing in a court to institute a creditor's suit to reach the proceeds of property assigned for the benefit of creditors which he could not otherwise attach as the debtor's property. Lawrence *v.* Bank, 35 N. Y. 320. And further to the same principle Thurber *v.* Blanck, 50 N. Y. 80.

4. Bostwick *v.* Blake, 145 Ill. 85.

5. Rinchey *v.* Stryker, 28 N. Y. 45, 25 How. (N. Y.) Pr. 75; Kelly *v.* Lane, 28 How. (N. Y.) Pr. 128; Greenleaf *v.* Mumford, 30 How. (N. Y.) Pr. 30, 19 Abb. Pr. (N. Y.) 469, 50 Barb. (N. Y.) 543; Bates *v.* Plonsky, 62 How. (N. Y.) Pr. 429; Bates *v.* Plonsky, 28 Hun (N. Y.) 112, s. c. 64 How. (N. Y.) Pr. 232; Ellsworth *v.* Phelps, 30 Hun (N. Y.) 646; Frost *v.* Mott, 34

When a creditor files a creditor's bill to cancel and set aside as fraudulent a judgment rendered against his debtor, and to have the property of the debtor applied to the satisfaction of his demand, he must aver in his complaint either that the plaintiff has acquired a lien on the property he seeks to reach, or that he has recovered a judgment upon which an execution has been issued and returned "no property found."[1] And there must be proof that the plaintff in the attachment is a creditor, and that he has acquired a lien by means of his attachment; and the defense will be at liberty to show the contrary.[2]

When an attaching creditor relies upon the fraud in the sale as his defense in attaching property that has been sold, he must show affirmatively that his attachment has been properly issued.[3] And it has been further held that there must be proof not only that the attachment is regular, but that the defendant is indebted to the plaintiff.[4]

§ 321. **The lien may be protected by removing adverse claims.**—When a creditor is permitted to attach property on which another has a prior lien;[5] and the attaching creditor obtains a lien by his levy, he may acquire the rights of the prior lienor, and thereby dispense with an intervening third person. And where an equity of redemption in land may be attached,[6]

N. Y. 253; Wilson *v.* Forsyth, 24 Barb. (N. Y.) 105; Potter *v.* Mather, 24 Conn. 551; Peck *v.* Whiting, 21 Conn. 206; Owen *v.* Dixon, 17 Conn. 592; Dodge *v.* Griswold, 8 N. H. 425; Angier *v.* Ash, 6 Foster (N. H.) 99; Dixon *v.* Hill, 5 Mich. 404.

In Iowa and Louisiana an attachment levied on land that has been fraudulently conveyed creates no lien thereon unless supplemental proceedings are instituted for that purpose. Taylor *v.* Branscombe, 74 Iowa 534, 38 N. W. Rep. 400; Boggs *v.* Douglass, (Iowa) 56 N. W. Rep. 412; Redwitz *v.* Waggaman, 33 La. Ann. 26.

1. Castle *v.* Bader, 23 Cal. 75.
2. Cocks *v.* Varney, 45 N. J. Equ. 72.
3. Thornburgh *v.* Hand, 7 Cal. 554.
4. Noble *v.* Holmes, 5 Hill (N. Y.) 194; Van Etten *v.* Hurst, 6 Hill (N. Y.) 311.
5. See *ante*, § 38; King *v.* Hubbell, 42 Mich. 597.

In most cases no lien can be created as against a mortgagee by attachment on personal property then subject to an incumbrance, without first paying or tendering to him the amount of the prior lien. Laing *v.* Parrott, 48 Mich. 298; Baldwin *v.* Talbot, 46 Mich. 19; Nathan *v.* Giles, 5 Taunton 558, 576. But if the validity of the mortgage is not admitted by the attachment plaintiff, he may ignore the mortgage, and, after levy, test the right of property. Barber *v.* Smith, 41 Mich. 138; also preceding section.

6. Springett *v.* Colerick, 67 Mich. 362.

the lien thereby acquired is a sufficient interest in the land to give the attaching creditor a right to redeem.[1]

§ 322. **The lien can be destroyed only by a dissolution of the attachment.**—In attachment causes the jurisdiction over any given subject-matter is obtained by the levy thereon of a writ properly issued. And it is a rule of univeral application that when a court once acquires jurisdiction, subsequent error or irregularity will not divest it. No matter what or how great errors or irregularities may subsequently occur, the *res* remains in the grasp of the court.[2] The lien created by a proper levy of a legal attachment can be destroyed by no subsequent act except the dissolution of the attachment.[3] The defendant cannot impair the attaching creditor's lien by divesting himself of the property;[4] nor can the subsequent rights acquired by third persons effect it in any way.[5] It is not effected by a sale under execution, though such execution be issued before judgment in the attachment suit.[6] The removal of a non-resident defendant into the state after the commencement of the attachment will not affect the lien;[7] nor will obtaining a release of the attached property upon the forthcoming bond, or bonds to pay the amount of the judgment, unless the attachment be dissolved by the latter.[8] The appointment of a trustee of a corporation under a statute in the state in which the corporation is situated does not effect the lien acquired by an attachment of choses in action in a suit against such foreign corporation.[9]

1. Lyon *v.* Sandford, 5 Conn. 544.

As to what will work a dissolution generally, see *post*, § 326.

2. Hardin *v.* Lee, 51 Mo. 241.

The judgment of the court in regard to the property so brought within its jurisdiction will be valid and binding until reversed on error, or by appeal, or set aside in a direct or appropriate proceeding for that purpose. The judgment can not be vacated collaterally, nor at suit of a stranger. Hardin *v.* Lee, 51 Mo. 241.

3. As to what will work a "Dissolution of the Attachment" generally, see *post*, § 326.

4. Davenport *v.* Lacon, 17 Conn. 278; Bach *v.* Goodrich, 9 Rob. (La.) 391; see *supra*, § 319.

5. Murray *v.* Gibson, 2 La. Ann. 311.

6. Husbands *v.* Jones, 9 Bush (Ky.) 218; Bourne *v.* Hocker, 11 B. Mon. (Ky.) 23; Beck *v.* Brady, 7 La. Ann. 1.

7. Larimer *v.* Kelley, 10 Kan. 298.

8. Stevenson *v.* Palmer, 14 Colo. 565, 24 Pac. Rep. 5.

9. Fenton *v.* Lumberman's Bank, 1 Clarke (N. Y.) 286.

Nor will a proceeding in bankruptcy or insolvency in any way impair the lien acquired by attachment unless the insolvent or bankrupt law expressly declares that an attachment lien is dissolved by the proceeding.[1] The attachment lien created by the levy upon the property of an insolvent state bank is not destroyed, if, subsequently thereto, a receiver be appointed for such bank.[2]

The attachment creditor after levy can not be divested of his lien without his voluntary act or day in court. Therefore, a decree subsequently rendered in the court of another state in a proceeding to which he was not a party will not affect the lien ;[3] nor will any voluntary act of his affect it unless the same be a waiver or abandonment. The withdrawal of a plea in abatement will not vitiate it, because the judgment will still be for the enforcement of the lien acquired by the levy of the attachment.[4] The replevin of attached property will not affect it where the same is resorted to only for the purpose of obtain-

1. Thomas *v.* Brown, 67 Md. 512, 10 Atl. Rep. 713; Noyes *v.* Johnson, 13 R. I. 183; McEachin *v.* Reid, 40 Ala. 410; Berryman *v.* Stern, 14 Nev. 415; Wright *v.* Dawson, 147 Mass. 384, 18 N. E. Rep. 1; Wright *v.* Morley, 150 Mass. 513, 23 N. E. Rep. 232; Kaiser *v.* Richardson, 5 Daly (N. Y.) 301.

In Rhode Island the assignment of partnership property only will not dissolve the attachment. Aldrich *v.* Arnold, 13 R. I. 655. And under a statute providing that a judgment debtor may release an attachment before the property is sold by recording where the assignor resides, or his real estate is situate, an assignment of his property for the benefit of his creditors; attached property of a partnership composed of a resident and a non-resident can not be thus released. *In re* Wheelock, (R. I.) 28 Atl. Rep. 966.

In Louisiana an attachment in a federal court is dissolved by an accepted cession of the attached property to creditors under the insolvent laws of the state, because the U.S.Rev. Stat. declares that attachments in the Federal Court shall be dissolved by any cause which would dissolve similar attachments in the state courts. Shwartz *v.* H. B. Claflin Co., 60 Fed. Rep. 676, 9 Cir. Ct. App. 204; Kern *v.* H. B. Claflin Co., 60 Fed. Rep. 676, 9 Cir. Ct. App. 204.

The lien which a landlord has, in Alabama, upon the crops grown on the rented land for the rent of the current year is not created by the levy of the attachment, but grows out of the contract, and therefore if the tenant die after an attachment is levied and his estate be declared insolvent, the attachment lien will not be thereby dissolved or destroyed. McDonald *v.* Morrison, 50 Ala. 30.

2. Arnold *v.* Weimer, 40 Neb. 216, 58 N. W. Rep. 709; Arnold *v.* Globe Ins. Co., 58 N. W. Rep. 712.

3. McBride *v.* Harn, 48 Iowa 151.

4. Claflin *v.* Sylvester, 99 Mo. 276, 12. S. W. Rep. 508.

ing possession of the property pending the attachment suit;[1] nor will proceeding to judgment, and execution sale of the attached goods pending appeal, with supersedeas, from an order dissolving the attachment.[2]

The lien will, however, be lost if personal property which is easily removable is not retained in the possession of the officer,[3] or if the plaintiff does not prosecute his suit to judgment and execution with all due diligence.[4] Attachment like any other remedy may be defeated by any act which will bar or take away the remedy or right to judgment under it.[5]

The lien will be restored by the reversal of the order vacating the attachment. Vacating the attachment destroys the lien. Restoring the attachment restores the lien.[6] Likewise if the plaintiff suffers a voluntary non-suit which is afterward set aside on his motion at the same term of court, the lien will then be as it was before the non-suit was granted.[7] But when the lien is once vacated it can not be restored so as to affect the rights of intervening third persons.[8]

§ 323. **The lien is merged into a judgment for the plaintiff.** —The inchoate lien created by the levy of the attachment, for the satisfaction of the particular debt, becomes perfected when the debt is merged into a judgment for the plaintiff. When a judgment is obtained which is a lien upon the attached property, the attachment lien becomes merged into the judgment lien and the latter relates back to the levy of the attachment

1. Scarborough *v.* Malone, 67 Ala. 570; Cary *v.* Gregg, 3 Stewart (Ala.) 433.

2. Martin *v.* Maxey, 14 Mont. 85, 35 Pac. Rep. 667; Clow *v.* Gilbert, 54 Ill. App. 134.

3. Thompson *v.* Baker, 74 Me. 48; Sanderson *v.* Edwards, 16 Pick. (Mass.) 144; Harriman *v.* Gray, 108 Mass. 228.

4. Van Loan *v.* Kline, 10 Johns. (N. Y.) 129; Owen *v.* Dixon, 17 Conn. 492.

If the action be against a firm composed of two members and one only be served with summons, the lien will be lost unless publication be made as to the other, as required by the statute. Donnell *v.* Williams, 21 Hun (N. Y.) 216, 59 How. (N. Y.) Pr. 68.

5. Exp. Foster, 2 Story, 131.

6. Pach *v.* Gilbert, 9 N. Y. S. 548, 18 Civil Proc. Rep. 262, affirming s. c. 7 N. Y. S. 336.

7. Dollins *v.* Pollock, 89 Ala. 351, 7 So. Rep. 904.

8. Pach *v.* Orr, 1 N. Y. S. 760; Pach *v.* Gilbert, 9 N. Y. S. 548, 18 Civil Proc. R. 262.

and is superior to all liens created, or transfers made, subsequent to the levy.[1] And when a sale is made, upon an execution issued upon the plaintiff's judgment in the attachment suit, such title as the defendant had at the time of the levy, passes to the purchaser unaffected by any conveyance or encumbrance made subsequent to the levy.[2] After the judgment is obtained, it is the judgment lien and not the attachment lien which must be enforced; for the latter has become merged into the former and has no further existence, except to preserve the priority by it acquired, which must be enforced under the judgment by virtue of an execution issued thereon.[3] But it is the process of attachment which created the lien and not the judgment rendered on it.[4] And the lien must be existing when the judgment is rendered, or such judgment will not relate back to any time prior to its rendition.[5]

However, it may be well to note that when the judgment rendered is appealed from, and the lien of such judgment is by virtue of a statute released by the execution of a sufficient undertaking, the lien of attachment is not thereby released

1. Scarborough *v.* Malone, 67 Ala. 570; People *v.* Cameron, 7 Ill. (2 Gilm.) 468; Richardson *v.* Adler, 46 Ark. 43; Frellson *v.* Green, 19 Ark. 376.

2. Lackey *v.* Seibert, 23 Mo. 85; Cockey *v.* Milne's Lessee, 16 Md. 200; Striplin *v.* Cooper, 80 Ala. 256; Randolph *v.* Carlton, 8 Ala. 606.

3. Speelman *v.* Chaffee, 5 Colo. 247; Lynch *v.* Crary, 52 N. Y. 181; Juilliard *v.* May, 130 Ill. 87.

And the attachment still continues in so much that it may be referred to for purposes of indentification. Juilliard *v.* May, 130 Ill. 87.

4. Stephen *v.* Thayer, 2 Bay (S. C.) 272; Am. Ex. Bank *v.* Morris Canal and Banking Co., 6 Hill (N. Y.) 362.

5. Lynch *v.* Crary, 52 N. Y. 181.

Under the Indiana statute the lien created by the levy of an attachment has no force or effect after the judgment has been rendered in the cause, in aid of which it has been issued, unless there is a special judgment or order of sale of the property attached and a special execution. Lowry *v.* McGee, 75 Ind. 508; Foster *v.* Dryfus, 16 Ind. 158.

And in Tennessee a judgment will not perfect the lien created by the levy unless it contain an order of condemnation and describe the property with such certainty that a *venditioni exponas* may issue deriving its direction and authority exclusively therefrom. Staunton *v.* Harris, 9 Heisk. (Tenn.) 579; Hillman *v.* Werner, 9 Heisk. (Tenn.) 586.

But under the Montana code the lien of attachment is not lost by taking a simple money judgment. State *v.* Eddy, 10 Mont. 311, 25 Pac. Rep. 1032. And also in Texas, prior to the adoption of the revised statutes, the mere rendition of a personal judgment pre-

when the judgment of itself does not become a lien upon the attached property.[1]

§ 324. **The lien is continued when an appeal is taken from a judgment for the defendant.**—A judgment for the attachment defendant is primarily a dissolution of the attachment and a discharge of the lien. But if an appeal be taken to such judgment, or to an order of dissolution of the attachment, the lien is thereby continued.[2] And it can not be affected by any interests acquired during the pendency of the appeal.[3] But under a statute providing that if the attachment defendant shall recover judgment when real estate has been attached, the clerk shall certify the judgment to the register of deed, who "shall enter such certificates upon the records of his office in satisfaction of the lien of such attachment," the appeal of the plaintiff from a judgment for the defendant on the merits when land has been attached will not continue the attachment lien during the pendency of the appeal, unless immediate notice be given of the appeal, a proper bond tendered and a special order of the court entered, decreeing that the lien continue.[4]

§ 325. **To protect the lien a demand on the judgment must be made.**—Since the whole purpose of an attachment is to seize

served the lien without such judgment containing either an order to sell or a reservation of a privilege to sell and without foreclosure of the lien. Wallace *v.* Bogel, 66 Tex. 572, 2 S. W. Rep. 96.

1. By force of the code in California a judgment becomes a lien on real property of the defendant owned by him at the time, and not exempt from execution in the county, from the time the judgment is filed; and the lien continues for two years, "unless enforcement of the judgment be stayed on appeal by the execution of a sufficient undertaking, as provided by this code, in which case the lien ceases." Therefore, land conveyed by the attachment debtor after attachment and before judgment was not relieved from the lien by the execution of a bond on appeal from the judgment, because there was no judgment lien thereon into which the attachment lien could merge. Riley *v.* Nance, 97 Cal. 203, 31 Pac. Rep. 1126; Riley *v.* Nance, 32 Pac. Rep. 315.

2. Calvert Lithographing Co. *v.* K. & K. Medical Ass'n, 61 Mich. 336, 28 N. W. Rep. 111; Riley *v.* Nance, 97 Cal. 203, 31 Pac. Rep. 1126; Riley *v.* Nance, 32 N. W. Rep. 315.

3. Ryan *v.* Maxey, 14 Mont. 81, 35 Pac. Rep. 515; Loveland *v.* Alvord, C. Q. M. Co., 76 Cal. 562.

Even though no *supersedeas* bond be filed as required in the appeal. Harison *v.* Trader, 29 Ark. 85.

4. Meloy *v.* Orton, 42 Fed. Rep. 513.

and hold the defendant's property until it can be subjected to an execution, its object can not be accomplished unless a judgment be obtained against the defendant and the attached property subjected to an execution. Most statutes limit the time within which such an execution levy must be made, and the attachment lien will not be preserved as against third persons unless the conditions of the statute be strictly observed.[1] If, however, the levy under the execution be begun within the time limited by the statute therefor, it may be completed after the expiration thereof.[2]

1. Whipple *v.* Sheldon, 63 Vt. 197, 21 Atl. Rep. 271; Sowles *v.* Witters, (Cir. Ct.) 55 Fed. Rep. 159; Sanford *v.* Pond, 37 Conn. 588; Gates *v.* Bushnel, 9 Conn. 530; Green *v.* Dougherty, 55 Mo. App. 217.

2. Heywood *v.* Hildreth, 9 Mass. 393. See, also, Bliss *v.* Stevens, 4 Vt. 88.

CHAPTER XV.

DISSOLUTION OF ATTACHMENT.

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§ 326. **Dissolution by incidental acts and omissions—(a) Generally.**—The object to be attained by dissolution of attachment is the discharge of the lien created by the attachment and the release of the attached property. The formal dissolution of attachment by order of court is a matter of great importance, for although the attachment writ may have been groundlessly issued the lien created by the levy will nevertheless be *operative* until the attachment is discharged by regular proceedings.[1] If the attachment proceedings be utterly *void* it *may* be brought to the attention of the court even after judgment in the attachment proceedings and in the main action, by a proper "collateral" proceeding. But the lien may be dissolved during the pendency of the main action and if the proceedings be *irregular* and *voidable* only, an objection thereto *must* be raised in apt time before judgment.[2] Irregularities which are apparent on the face of the proceedings themselves will give ground for the dissolution of an attachment upon motion.[3] And where the original proceedings are unwarranted, because of falsehood in the averment of the grounds therefor or otherwise, it will give ground for the dissolution of an attachment upon a denial of the averments in the original papers.[4] Other than these there are many acts both of omission and commission, because of the performance or non-performance of which during the pendency of a proceeding in attachment, that will work a dissolution thereof, releasing the attached property from the lien thereby created. The failure to proceed at the proper term of court will dissolve an attachment,[5] and so will an illegal interchange of judicial officers.[6] In fact any act, or failure to act, which deprives the court of power to retain the property seized, will of necessity release such property from the attachment lien.[7] Some of these will be indicated in the following sections.

1. Bittick *v.* Wilkins, 7 Heisk. (Tenn.) 307; *ante*, § 322.
2. *Post*, § 345.
3. *Post*, § 338.
4. *Post*, § 348.
5. Bank of Washington *v.* Brent, 2 Cranch C. Ct. 538.
6. Wells *v.* Mansur, 52 Vt. 239.
7. Compare Murdock *v.* Steiner, 45 Pa. St. 349.

§ 327. (b) **By giving security in different ways.**—That an attachment will be dissolved by the giving of security for the payment of any judgment which may be obtained has been hereinbefore shown.[1] It will be effected by giving security for the payment of the indebtedness in many other ways. If the creditor accept from the debtor a deed of trust to all his creditors, and sign an agreement to pay all of them *pro rata*, it will discharge the lien.[2] It is also effected by suing out a *certiorari* and giving bond for the payment of the judgment.[3] And it seems that the same effect will be produced by a writ of error from the supreme court of the United States to the supreme court of a state.[4]

Rejecting proffered security, or waiving a right to claim security of an absent debtor to perform the judgment, will discharge the attachment.[5]

When perishable property, which has been seized on an attachment, is sold in the manner provided by law, the lien upon the property is released and transferred to the proceeds of the sale.[6]

§ 328. (c) **By alteration in the writ.**—Any alteration of a writ of attachment which will change the grounds, or cause of action, by increasing the same or inserting a new cause, which will affect the rights of creditors who have subsequently attached, will dissolve the attachment made on the original writ as against creditors who have attached before the rendition of judgment and subsequent to the levy thereon,[7] unless such alteration is made by order of court or the agreement of parties.[8]

1. See *ante*, § 302, *et seq.*

2. Rabity *v.* Stringfellow, 72 N. C. 328; Claiborne *v.* Stewart, 4 Baxter (Tenn.) 206; Ryhiner *v.* Ruegger, 19 Ill. App. 156.

3. Vanderhoof *v.* Prendergast, 94 Mich. 18, 53 N. W. Rep. 792; Bushey *v.* Raths, 45 Mich. 181, 7 N. W. Rep. 802; Treat *v.* Dunham, 74 Mich. 114, 41 N. W. Rep. 876.

4. Danforth *v.* Carter, 4 Iowa 230; Otis *v.* Warren, 16 Mass. 53.

5. Tiernans *v.* Schley, 2 Leigh (Va.) 25.

6. See *ante*, § 262; Welsh *v.* Lewis, 71 Ga. 387.

7. *Ante*, § 240, and Clough *v.* Monroe, 34 N. H. 381.

8. Laighton *v.* Lord, 29 N. H. (9 Fost.) 237.

But if the prior attaching creditor increases the original amount claimed, by an amendment in good faith after another creditor has attached, the lien

§ 329. (d) **By delivering the attached property to the debtor, i. e., by abandonment.**—As hereinbefore shown,[1] if the officer abandons or loses the possession of goods attached, or if he, or any person to whom he may have delivered them for safe keeping, permits them to return to the possession of the debtor, the attachment is dissolved as to third persons.[2] For to sustain the lien the property must be continuously in the actual or constructive possession of the officer; and such a dissolution by surrendering possession to the debtor will not be prevented by a stipulation of the debtor that the officer or his agent may have "a daily supervision" of the chattel.[3]

§ 330. (e) **By substitution of parties.**—Since the only property which can be held by process of attachment is the property of the defendant in the action,[4] and the return must state that the property seized is the property of the defendant,[5] it follows that where there is a substitution of defendants, the property held by the attaching officer will then not be the property of the defendant, and the attachment lien thereon will be discharged.[6] But where there is a change in the name of the defendant, which is not such as to endanger the rights of other persons because of uncertainty as to the persons sought to be identified thereby, such a change of name will not work a dissolution of the attachment.[7]

will not be lost, if, upon obtaining judgment for that amount, he directs the sheriff to levy only for the amount originally claimed. Cutler *v.* Lang, 30 Fed. Rep. 173.

1. See *ante*, § 256.

2. Boynton *v.* Warren, 99 Mass. 172; Wheeler *v.* Nichols, 32 Me. 233; Butler *v.* White, 25 Minn. 432; Dunklee *v.* Fales, 5 N. H. 527; Carrington *v.* Smith, 8 Pick. (Mass.) 419; Bagley *v.* White, 4 Pick. (Mass.) 395; Taintor *v.* Williams, 7 Conn. 271.

3. Baker *v.* Warren, 6 Gray (Mass.) 527.

4. See *ante*, § 38, "What Property or Interest may be Reached," and § 200, "Execution of the Writ."

5. *Ante*, § 234.

6. But if there is a substitution of defendants by agreement, the case may stand upon the footing of an ordinary suit against the substituted defendant with service waived. Milledgeville Mfg. Co. *v.* Rives, 44 Ga. 479.

7. Striking out the middle letter of the defendant will not dissolve an attachment of personal property as between the original parties when no third peron's rights have intervened. Wentworth *v.* Sawyer, 76 Me. 434.

Nor will the insertion of a middle letter vacate an attachment of personal property so as to give priority even to one who has taken a mortgage

Likewise changing the name of the plaintiff will work a dissolution of the attachment when the same will be cause for abating other processes of law. The rule relating to *idem sonans* will of course apply.[1]

§ 331. (f) **By insolvency or bankruptcy of the debtor.**— Upon the theory that insolvency or bankruptcy is a kind of civil death, or that the debtor's property is in custody of law for the *pro rata* satisfaction of the claims of his creditors, no lien of attachment can be acquired upon the property of a bankrupt. The statutes of different states are varied in regard to the force and effect given to insolvency and bankruptcy proceedings. There is a line of statutes which provides that an assignment in bankruptcy dissolves an attachment sued out within a certain time before the proceedings in bankruptcy. But in the adjudication of cases thereunder it is held that the commencement of bankruptcy proceedings is not sufficient to dissolve the attachment, and that it is the adjudication alone which has that effect.[2] Another line of statutes preserved attachment liens from the effect of proceedings in bankruptcy.[3]

in the interval between the filing of the writ and the making of the amendment. Diettrich *v.* Wolffsohn, 136 Mass. 335.

1. The amendment of the Christian name of the plaintiff from "Edward" to "Edmund," has been held to dissolve an attachment to enforce a lien for wages. Flood *v.* Randall, 72 Me. 439.

2. Sullivan *v.* Rabb, 86 Ala. 433, 5 So. Rep. 746; *Re* Shields, 15 Bankr. Reg. 532; *Re* Badenheim, 15 Bankr. Reg. 370; Peck *v.* Jenness, 7 How. Sup. Ct. 612; Weisenfeld *v.* Mispelhorn, 5 W. Va. 46; Holyoke *v.* Adams, 2 Thomp. & C. (N. Y.) 1; Duffield *v.* Horton, 10 Hun (N. Y. Supreme Ct.) 140. Compare Brewers,' etc., Ins. Co. *v.* Davenport, 10 Hun (N. Y. Supreme Ct.) 264; Gathercole *v.* Bedel, 65 N. H. 211, 18 Atl. Rep. 319; King *v.* Loudon, 53 Ga. 64. Compare Cerf *v.* Oaks, 59 Cal. 132.

When a debtor has been discharged in bankruptcy, such discharge may be pleaded in bar to the attachment suit. Fisher *v.* Vose, 3 Rob. (La.) 457.

But as to the judgment obtainable in such a case in Connecticut, see Ingraham *v.* Phillips, 1 Day (Conn.) 117. But it is the assignee of the bankrupt and not the contending creditor that can raise the question of bankruptcy. Golsan *v.* Powell, 32 La. Ann. 521. Compare Athol National Bank *v.* Hingham Mfg. Co., 121 Mass. 399; Munson *v.* Boston, etc., R. R. Co., 120 Mass. 81.

3. Wells *v.* Brander, 10 Sm. & M.

Under the rule that proceedings in a Federal court will be dismissed on any contingency on which they would be dissolved in a state court, insolvency proceedings in a state court may be shown in bar of attachment proceedings in a Federal court.[1]

§ 332. (g) **By death of a defendant.**—Whether the death of a party will dissolve attachment proceedings, so much depends upon the local statutes prescribing what causes of action shall and what shall not survive, that few decisions can be cited here that will be of general application.

In California, Louisiana and Missouri, the death of the defendant, after the levy of an attachment upon his property and before judgment therein, dissolves the attachment lien.[2] And in Missouri it is dissolved even after special judgment rendered in attachment, if there has been no personal service upon the defendant.[3]

In Alabama the death of the defendant does not destroy the lien of attachment levied upon personal property, but does destroy the lien upon attached real estate, unless the action is revived and prosecuted to judgment against the administrator.[4]

In New York it has been held that the allowance of an at-

(Miss.) 348; Peck *v.* Jenness, 7 How. 612; Kittredge *v.* Emerson, 15 N. H. 227; In Matter of Rowell, 21 Vt. 620.

It has been said that where a defendant corporation suffered civil death by a decree of forfeiture of its charter by a judicial tribunal before judgment in the attachment case, the attachment was dissolved; but this was on the theory that attachment was for the purpose of compelling an appearance. Farmers', etc., Bank *v.* Little, 8 Watts & S. (Pa.) 207; Bowker *v.* Hill, 60 Me. 172. But in Illinois the lien of attachment was not dissolved by insolvency proceedings dissolving the corporation and appointing a receiver to take charge of its assets. Life Ass'n *v.* Fassett, 102 Ill. 315.

1. Neufeld *v.* Neufeld, 37 Fed. Rep. 560; and *vice versa*, People's Bank *v.* Mechanics', etc., Bank, 62 How. (N.Y.) Pr. 422.

2. Hensley *v.* Morgan, 47 Cal. 622; Myers *v.* Mott, 29 Cal. 359; Collins *v.* Duffy, 7 La. Ann. 39; Sweringen *v.* Eberius, 7 Mo. 421.

3. Harrison *v.* Renfro, 13 Mo. 446.

4. Lipscomb *v.* McClellan, 72 Ala. 151; Phillips *v.* Ash, 63 Ala. 414; McClellan *v.* Lipscomb, 56 Ala. 255.

If death is attended by insolvency judicially ascertained, the lien on personal property is lost. Woolfolk *v.* Ingram, 53 Ala. 11; Hale *v.* Cummings, 3 Ala. 398; Lamar *v.* Gunter, 39 Ala. 324; McEachin *v.* Reid, 40 Ala. 410; Maxwell *v.* Pike, 2 Me. 8.

tachment is a provisional remedy by which the plaintiff acquires such a right in the attached property as will not be defeated by the death of the defendant if the action survives, but the same may be continued against his representatives.[1] The same rule prevails in Iowa,[2] New Jersey,[3] West Virginia,[4] and Florida.[5] The contrary rule applies in Rhode Island, although the cause of action itself survives.[6]

In Tennessee, likewise, attachment not being a proceeding *in rem*, no judgment can be obtained until the personal representative is made a party to the suit.[7] But when this is done the lien still subsists as though the defendant had not died.[8]

In Mississippi, by force of the statute, the death of the defendant after service of the writ will not abate or discontinue it, but it shall be carried on to final determination and sale, as if the defendant were alive and death had not occurred. It was there held that while the court had no power to render a personal judgment against the defendant for his death, yet a judgment might be entered against the garnishee to the extent of the property in his hands and no further.[9] And where the garnishee had been served before the death of the defendant, and the administrator appeared after death of the defendant, and without personal service having been had upon such defendant, the garnishee was held likewise liable.[10]

In New Hampshire and Pennsylvania the attachment is not dissolved by the death of the defendant where such death occurs after judgment is rendered, although he die before sale is made of the property.[11]

1. Thatcher *v.* Bancroft, 15 Abb. (N. Y.) Pr. 243.

2. Lord *v.* Allen, 34 Ia. 281.

3. Smith *v.* Warden, 35 N. J. L. 346.

4. White *v.* Heavner, 7 W. Va. 324.

5. Loubat *v.* Kipp, 9 Fla. 60.

6. Dwyer *v.* Benedict, 12 R. I. 459.

7. Green *v.* Shaver, 3 Humph. (Tenn.) 139.

8. Perkins *v.* Norvell, 6 Humph. (Tenn.) 151.

Although the estate may be insolvent. Boyd *v.* Roberts, 10 Heisk. (Tenn.) 474. As to insolvency at death in Maine, see Ridlon *v.* Cressey, 65 Me. 128; and as to insolvency at death in Massachusetts, see Day *v.* Lamb, 6 Gray (Mass.) 523.

9. Holman *v.* Fisher, 49 Miss. 472.

10. Dyson *v.* Baker, 54 Miss. 24. The same principle maintains in South Carolina. Kennedy *v.* Raguet, 1 Bay (S. C.) 484.

11. Waitt *v.* Thompson, 43 N. H. 161;

§ 333. (h) **By judgment in favor of the defendant.**—A final judgment for the defendant in the attachment suit dissolves the attachment *ipso facto*,[1] although a judgment may have been rendered for the plaintiff on a plea in abatement,[2] unless a *supersedeas* by a writ of error is sued out or an appeal is taken,[3] likewise a verdict in favor of the defendant on a plea in abatement will release the attached property from the lien, although no trial has been had upon the issue of the indebtedness.[4]

§ 334. (i) **By judgment of nonsuit; or by excessive judgment.**—Where a judgment as of a nonsuit is rendered in a proceeding aided by attachment, the attachment is thereby dissolved.[5]

If a creditor knowingly and intentionally take judgment for more than could possibly have been recovered at the commencement of his suit, it will be a fraud upon a subsequent

Bowman *v.* Stark, 6 N. H. 459; Fitch *v.* Ross, 4 Serg. & R. (Pa.) 557.

In Pennsylvania and Maryland the death before final judgment dissolves the attachment where special bail has not been entered. Fitch *v.* Ross, 4 Serg. & R. (Pa.) 557; also Pancost *v.* Washington, 5 Cranch C. C. 507.

1. Clap *v.* Bell, 4 Mass. 99; Suydam *v.* Huggeford, 23 Pick. (Mass.) 465; Buchman *v.* Dodds, 6 Ill. App. 25; Stix *v.* Dodds, 6 Ill. App. 27; Johnson *v.* Edson, 2 Aikens (Vt.) 299; Loveland *v.* Alvord, etc. Co., 76 Cal. 562, 18 Pac. Rep. 682; Blynn *v.* Smith, 4 N. Y. S. 306; Ranft *v.* Young, 21 Nev. 401, 32 Pac. Rep. 490.

And the fact that there is a new trial pending will not have the effect of keeping it in force. Ranft *v.* Young, 21 Nev. 401, 32 Pac. Rep. 490.

2. Boekhoff *v.* Gruner, 47 Mo. App. 22.

3. Sherrod *v.* Davis, 17 Ala. 312; Lowenstein *v.* Powell, 68 Miss. 73, 8 So. Rep. 269.

Judgment in favor of the defendant on a feigned demurrer will dissolve the attachment if the plaintiff does not appeal therefrom, or, if he appeals and fails to enter the action at the next term of the court to which he has appealed. Suydam *v.* Huggeford, 23 Pick. (Mass.) 465.

4. Ranscher *v.* McElhinney, 11 Mo. App. 434.

Unless a bill of exceptions is tendered at the next term of court. Ranscher *v.* McElhinney, 11 Mo. App. 434.

5. Brown *v.* Harris, 2 Greene (Ia.) 505; Hubbell *v.* Kingman, 52 Conn. 17.

And in Iowa the lien is not revived by setting aside such judgment of nonsuit, but in Connecticut it is so revived if the judgment be set aside at the same term. Brown *v.* Harris, 2 Greene, (Ia.) 505; Hubbell *v.* Kingman, 52 Conn. 17.

attaching creditor and work a dissolution of the attachment as to him.[1]

§ 335. (j) **By personal judgment alone for plaintiff; or by not including portion in order of sale.**—The rendition of a personal judgment alone for the plaintiff in a proceeding aided by attachment, at least in Illinois and Indiana, operates to quash the attachment and the property is as free as though no attachment proceedings had been begun. To preserve the attachment, there must be also an order of sale.[2] Therefore, if an order to sell in these states does not include the whole of the attached property, the attachment will be released as to the portion not included in such order.[3]

§ 336. (k) **By failure to demand property within the time required by statute.**—In some states the statute prescribes that within a certain number of days a demand must be made on execution or the attachment will be dissolved *ipso facto*.[4] In some such cases, however, the court has discretion to forward the case to a subsequent term for the purpose of continuing the lien of the attachment.[5]

§ 337. (l) **By failure to sell as directed by statute.**—When judgment is rendered for the plaintiff in the attachment, and an order is entered that the property be sold, such sale must be made by the officer in the manner prescribed by the controlling statute in order to pass title thereto, and if such sale is not made in the right mode and within the time prescribed the attachment lien is dissolved.[6]

1. Page *v.* Jewett, 46 N. H. 441; Tucker *v.* Green, 27 Kan. 355. *Contra see* Felton *v.* Wadsworth, 7 Cush. (Mass.) 587.

2. Wasson *v.* Cone, 86 Ill. 46; United States Mortgage Co. *v.* Henderson, 111 Ind. 24, 12 N. E. Rep. 88; Sannes *v.* Ross, 105 Ind. 558; Smith *v.* Scott, 86 Ind. 346; Lowry *v.* McGee, 75 Ind. 508.

3. Thomas *v.* Johnson, (Ind. Sup.) 36 N. E. Rep. 893.

4. Stackpole *v.* Hilton, 121 Mass. 449; Knap *v.* Sprague, 9 Mass. 258; Croswell *v.* Tufts, 76 Me. 295; Aiken *v.* Medex, 15 Me. 157.

5. Hackett *v.* Pickering, 5 N. H. 19. See, also, Wheeler *v.* Fish, 12 Me. (3 Fairf.) 241.

6. Eldridge *v.* Lancy, 17 Pick. (Mass.) 352; Aiken *v.* Medex, 15 Me 157.

§ 338. **Dissolution because of irregularities—(a) Generally.**—There are many defects and irregularities which may occur in the plaintiff's proceedings in attachment that will be sufficient cause for dissolving the attachment when the same is brought to the attention of the court, and which may yet not be sufficient to work a dissolution of themselves for they will be considered to be waived unless the attention of the court is drawn thereto and its aid invoked by the defendant. These defects and irregularities may be divided into two classes enabling us to say that there are two grounds upon which a dissolution of attachment may be procured. (1) Where some irregularity of a fatal character appears upon the face of the proceedings and (2) where the allegations upon which it is issued are untrue.[1] The first of these will receive attention in the next succeeding sections and the second will be considered thereafter.[2] Where the defects and irregularities for which a dissolution is sought appear upon the face of the proceedings, they are properly brought to the attention of the court by motion to dissolve the attachment or by motion to quash the writ. This motion is addressed to the sound discretion of the court and may be entertained or denied.[3] If the defect is intrinsic and not discernible on the face of the proceedings it can not generally be brought to the attention of the court on such a motion, but must be raised in some other manner; as by a plea, or a rule to show cause why the attachment should not be dissolved.[4]

§ 339. (b) **Because of insufficiency of the affidavit.**—Where an affidavit is in fact made but does not conform to the require-

1. Bates *v.* Killian, 17 S. C. 553; Mason *v.* Lieuallen, (Idaho) 39 Pac. Rep. 1117.

2. See *post*, § 348.

3. Busbin *v.* Ware, 69 Ala. 279; Cotton *v.* Heuey, 4 Ala. 56; Reynolds *v.* Bell, 3 Ala. 57; Brewer *v.* Tucker, 13 Abb. (N. Y.) Prac. 76; Coward *v.* Dillinger, 56 Md. 59; Lambden *v.* Bowie, 2 Md. 334; Bower *v.* Town, 12 Mich. 230; Harrison *v.* King, 9 Ohio St. 388; Cooper *v.* Reeves, 13 Ind. 53; Pomroy *v.* Parmlee, 9 Iowa 140; Olmstead *v.* Rivers, 9 Neb. 234; Bear *v.* Cohen, 65 N. C. 511; Crawford *v.* Jones, 2 La. Ann. 2; Boardmen *v.* Glenn, 7 La. Ann. 581; Garrett *v.* Taylor, 88 Ga. 647, 14 S. E. Rep. 869.

4. See *post*, § 348. Exceptions to this rule see *post*, § 347.

ments of the statute, the attachment issued thereon will be irregular,[1] and will be dismissed on motion.[2]

The total lack of an affidavit in an attachment proceeding may in many states be taken advantage of on motion to dissolve.[3] But since in such a case the court is wholly without jurisdiction the want of an affidavit may be pleaded in abatement,[4] or in bar.[5]

The mere failure to file with the clerk of the court, in the time and manner provided, the affidavit upon which the attachment was granted will not be a ground for vacating an attachment.[6]

§ 340. (c) **Because of insufficiency of the bond.**—A bond is

1. See *ante*, § 127.

2. Clark *v.* Roberts, 1 Ill. (Breese) 222; Blackwood *v.* Jones, 27 Wis. 498; Elliot *v.* Jackson, 3 Wis. 649; Espey *v.* Heidenheimer, 58 Tex. 662; Biddle *v.* Black, 99 Pa. St. 380; Ferguson *v.* Dunham, 10 Kan. 396; Ferris *v.* Carlton, 8 Phila. 549; Anderson *v.* Johnson, 32 Gratt. (Va.) 558.

Where the irregularities appearing on the face of the affidavit are not such as to have prevented the court from having acquired jurisdiction, the plaintiff may in many states be permitted to amend it in this regard. See *ante*, § 152. And if a motion is made to dissolve the attachment because of such irregularities, the motion will not be granted unless the plaintiff fails to take advantage of his opportunity to amend. Campbell *v.* Whetstone, 4 Ill. (3 Scam.) 361; Graves *v.* Cole, 1 Greene (Iowa) 405; Henderson *v.* Drace, 30 Mo. 358; Drew *v.* Dequindre, 2 Doug. (Mich.) 93; Quinlan *v.* Danford, 28 Kan. 507; McClanahan *v.* Brack, 46 Miss. 246; Lawton *v.* Kiel, 51 Barb. (N. Y.) 30; Lawton *v.* Reil, 34 How. (N. Y.) Pr. 465.

Many slight defects in the affidavit will be ignored when the same are plainly indicated by other portions of the instrument. Citizens' Bank *v.* Hancok, 35 La. Ann. 41. And in Kansas the attachment will not be vacated for a defective affidavit, if the evidence introduced at the hearing to vacate supplies the defect. Hodson *v.* Tootle, 28 Kan. 317.

3. McReynolds *v.* Neal, 8 Humph. (Tenn.) 12; Bruce *v.* Cook, 6 Gill & J. (Md.) 345; Coward *v.* Dillinger, 56 Md. 59; Ford *v.* Woodward, 2 Sm. & M. 260; Ford *v.* Hurd, 4 Sm. & M. (Miss.) 683; McClanahan *v.* Brack, 46 Miss. 246; Wright *v.* Smith, 19 Tex. 297; Erwin *v.* Commercial Bank, 3 La. Ann. 186.

4. Johnson *v.* Hannah, 66 Ala. 127; Wright *v.* Smith, 66 Ala. 545; Jones *v.* Pope, 6 Ala. 154.

5. Starbuch *v.* Murray, 5 Wend. (N. Y.) 148; Shumway *v.* Stillman, 4 Cowen (N. Y.) 292.

6. Bank of Augusta *v.* Conrey, 28 Miss. 667; Wheeler *v.* Slavens, 21 Miss. (13 Smed. & M.) 623; Brash *v.* Wielarsky, 36 How. (N. Y.) Pr. 253; Wright *v.* Ragland, 18 Tex. 289; Ketchin *v.* Landecker, 32 S. C. 155, 10 S. E. Rep. 936.

a prerequisite to the legal issuing of an attachment,[1] and where no such bond is filed the court is without jurisdiction and the attachment will be dissolved on motion,[2] but if the bond filed be insufficient, the attachment will not in most states be dissolved until the plaintiff has been given time to amend the defect by filing a new and sufficient bond.[3] Upon a motion to dissolve an attachment because of insufficiency of the bond, the court will not look beyond the face of the bond itself to ascertain its validity.[4] But if any clerical error therein can be ascertained by looking to the whole instrument to learn its intent, the irregularity will not be sufficient ground for dissolution.[5]

§ 341. **(d) Because of insufficiency of the writ.**—Defects in the form of the writ, or irregularities in the manner in which it is issued, when the same are apparent upon the face of proceedings, may be taken advantage of by a motion to dissolve the attachment.[6]

1. See *ante*, §§ 153 and 154.

2. Bank of Alabama *v.* Fitzpatrick, 4 Humph. (Tenn.) 311; Osborn *v.* Schiffer, 37 Tex. 434.

3. Planters', etc., Bank *v.* Andrews, 8 Port. (Ala.) 404; Love *v.* Derrick, 9 Port. (Ala.) 415; Lowry *v.* Stowe, 7 Port. (Ala.) 483; Didier *v.* Galloway, 3 Ark. 501; Hall *v.* Kintz, (Pa. Com. Pl.) 12 Pa. Co. Ct. R. 90; Hall *v.* Kintz, (Pa. Com. Pl.) 2 Pa. Dist. R. 16; Tevis *v.* Hughes, 10 Mo. 380; Henderson *v.* Drace, 30 Mo. 358; Beardslee *v.* Morgan, 29 Mo. 471; Kissam *v.* Marshall, 10 Abb. (N. Y.) Pr. 424; Oliver *v.* Wilson, 29 Ga. 642; Goddard *v.* Cunningham, 6 Iowa 400; Bretney *v.* Jones, 1 Greene (Iowa) 366. See *ante*, §§ 179 and 180.

4. Spear *v.* King, 14 Miss. (6 Smed. & M.) 276.

5. Hewes *v.* Cooper, 115 Mass. 42.

If the bond bear equal date with the attachment it will be presumed that it was taken before the issuance of the attachment. M'Kenzie *v.* Buchan, 1 Nott & M. (S. C.) 205; Summers *v.* Glancey, 3 Blackf. (Ind.) 361; Root *v.* Monroe, 5 Blackf. (Ind.) 594. See *ante*, §§ 154 and 158.

The want of a seal is an incurable defect in Iowa—Shaffer *v.* Sundwall, 33 Iowa 579—but not in Texas. Gasquet *v.* Collins, 57 Tex. 340. Further, see *ante*, § 160.

6. Reed *v.* Buck, (Pa. Com. Pl.) 32 W. N. C. 204; Genin *v.* Tompkins, 12 Barb. (N. Y.) 265; Blake *v.* Camp, 45 Ga. 298; Woodly *v.* Shirley, Minor (Ala.) 14; Musgrave *v.* Brady, 1 Morr. (Iowa) 456; Barber *v.* Swan, 4 Greene (Iowa) 352; Hagan *v.* Burch, 8 Iowa 309; Dean *v.* Garnet, 1 Duv. (Ky.) 408; Bourne *v.* Hocker, 11 B. Mon. (Ky.) 23; Erwin *v.* Commercial Bank, 3 La. Ann. 186; Mansur *v.* Coffin, 54 Me. 314; Byrd *v.* Hopkins, 16 Miss. (8 Smed. & M.) 441; Reynolds *v.* Damrell, 19 N. H. 394; Askew *v.* Stevenson, Phill. (N. C.) L. 288;

All objections to a defective writ will be waived by failing to object thereto and asking that the levy be set aside on other grounds.[1]

§ 342. (e) Because of insufficiency of the service and return.—The general rule is, as hereinbefore stated,[2] that where the return of a mesne process states that it was duly executed, all presumptions of law are in favor of the regularity of the acts of the officer and a *prima facie* case of due and proper execution is shown, but these presumptions may be disputed.[3] When the return shows that the attachment was not made at a time authorized by law,[4] or in a place authorized by law,[5] or does not properly describe the articles attached,[6] or the levy has not been made by an officer authorized so to do, the levy will be quashed.[7] But the writ itself will not abate though served only as a summons and no attachment of property is made.[8] And although it be served by a constable not authorized to execute writs of attachment from a circuit court, yet it may proceed as an action *in personam* where such a bond is filed as will constitute a personal appearance.[9]

Since an attachment, where considered as an auxiliary process, will fail if there is no service of summons,[10] it follows that

Park *v.* Harmon, 14 Vt. 211; Paine *v.* Tilden, 20 Vt. 554.

And to be regular in form it must not vary substantially from the affidavit. *Ante*, § 191, *et seq.*

But the existence of a defective count in the writ will not be sufficient ground for dismissal, if the writ be properly issued, in due form of law, and not an absolute nullity. Ela *v.* Shepard, 32 N. H. 277.

1. Wolf *v.* Cook, 40 Fed. Rep. 432; see further as to "Waiver," *post*, § 345.

And although the person named as defendant believe that another person was intended, yet he should appear and defend, for if a default judgment is recovered against him it will be operative. Frazer *v.* Sibley, 50 Ga. 96.

2. See *ante*, § 237.

3. Porter *v.* Pico, 55 Cal. 165.

4. McFarren *v.* Whervy, 5 Cranch C. Ct. 677.

5. Seidenbach *v.* Hallowell, 5 Dill. C. C. 382.

6. Green *v.* Pyne, 1 Ala. 235.

7. Lawrence *v.* Featherston, 18 Miss. (10 Sm. & M.) 345.

8. Seers *v.* Blakefly, 1 Root (Conn.) 54; Embra *v.* Silliman, 1 Root (Conn.) 128.

9. Bates *v.* Crow, 57 Miss. 676.

The failure to return the writ into court until after the return day will not be a ground for dissolving the attachment, although the cause may have been in the meantime removed to the federal court. Nims *v.* Spurr, 138 Mass. 209.

10. See *ante*, § 216.

where there is no service of summons personally or by publication in the manner and within the time prescribed by law, it will be dissolved on motion.[1]

Advertising,[2] and posting notices[3] being a part of the due execution of a writ of attachment, the same must be done at the time and in the manner prescribed by law, or the neglect so to do will be ground for quashing the attachment.[4]

§ 343. **Motion to dissolve attachment for irregularities—(a) Who may entertain it.**—As a fundamental principle it may be stated that a court without jurisdiction in the attachment case will be powerless to render an order dismissing it.[5] But the power of a court to control its own process is inherent.[6] Therefore a motion to vacate the attachment must be made to the court who granted it.[7] And the motion will be disposed of by the court and not by the jury.[8] By force of the statute

1. Cossitt *v.* Winchell, 39 Hun (N. Y.) 439; Betzemann *v.* Brooks, 31 Hun (N. Y.) 271; Taddiken *v.* Cantrell, 4 Thomp. & C. (N. Y.) 222; 1 Hun (N. Y.) 710; Blossom *v.* Estes, 84 N. Y. 614.

After it is so inoperative it can not be revived by the appearance of the defendant. Blossom *v.* Estes, 84 N. Y. 614.

2. Cory *v.* Lewis, 5 N. J. L. (2 South) 846.

3. Wilson *v.* Ray, T. U. P. Charlt. (Ga.) 109.

4. Cory *v.* Lewis, 5 N. J. L. (2 South.) 846; Wilson *v.* Ray, T. U. P. Charlt. (Ga.) 109.

As to the amendment of a return of service of process, see §§ 238 to 242.

5. Gay *v.* Eaton, 27 La. Ann. 166.

6. Morgan *v.* Avery, 7 Barb. (N. Y.) 656; Bank of Commerce *v.* Rutland, etc., R. R. Co., 10 How. (N. Y.) Pr. 1; Furman *v.* Walter, 13 How. (N. Y.) 348.

7. Conklin *v.* Dutcher, 5 How. (N. Y.) Pr. 386; White *v.* Featherstonhaugh, 7 How. (N. Y.) Pr. 357; Bank of Lansingburgh *v.* McKie, 7 How. (N. Y.) Pr. 360.

But when a motion is made to the proper court, and in a proper manner, there is no necessity that the presiding judge should be the same one who granted the attachment. Ruppert *v.* Haug, 87 N. Y. 141, s. c. 62 How. (N. Y.) Pr. 364.

8. Wiggin *v.* Kanady, 33 Tex. 721; Claflin *v.* Steenbock, 18 Gratt. (Va.) 842.

In Michigan the motion to dissolve may be made before a circuit court commissioner. For the law and practice in such cases, see, Edgarton *v.* Hinchman, 7 Mich. 352; Osborne *v.* Robbins, 10 Mich. 277; Albertson *v.* Edsall, 16 Mich. 203; Price *v.* Reed, 20 Mich. 72; Macumber *v.* Beam, 22 Mich. 395; Vinton *v.* Mead, 17 Mich. 388; Heyn *v.* Farrar, 36 Mich. 258.

in some states a judge at chambers has legal descretion to discharge an attachment on motion.[1]

If an attachment has been granted by a court having no legal power so to do, such attachment may be dismissed by a court having jurisdiction to review the actions of the court which granted it.[2]

The hearing of a motion to dissolve an attachment may be continued, even after the judge has announced his decision, upon the application of the party against whom such decision was made.[3]

§ 344. (b) **Who may move the court to dissolve an attachment.**—Who may be entitled to make a motion to dissolve an attachment for irregularities, is so little a matter of principle and so much a matter of special statutory provision, that no attention need be given to the subject in a general work like this, further than to suggest cases bearing upon the subject in the different states. It is sometimes held that no one other than a party to the suit may move the court to set aside the attachment for irregularities, even though he be a judgment creditor.[4] Therefore, it has been often said that no one but a defendant can take advantage of mistakes made by the plaintiff in suing out his attachment.[5] But the defendants'

1. Cohen *v.* Burr, 6 Wis. 200; Cureton *v.* Dargan, 12 S. C. 122; Shedd *v.* McConnell, 18 Kan. 594; Wells *v.* Danford, 28 Kan. 487; Merchants' Nat. Bank *v.* Danford, 28 Kan. 512; Walls *v.* Campbell, 125 Pa. St. 346, 23 W. N. C. 506, 17 Atl. Rep. 422; Walls *v.* Boteller, 23 W. N. C. 508, 17 Atl. Rep. 422.

And where he has such power he may do so, by the appearance of both parties without objection, although a regular session of the court was being held in the same county by a judge *pro tem.* Swearingen *v.* Howser, 37 Kan. 126, 14 Pac. Rep. 436; Yoakam *v.* Howser, 37 Kan. 130, 14 Pac. Rep. 438.

2. Buck *v.* Panabaker, 32 Kan. 466; Delmas *v.* Morrison, 61 Miss. 314.

3. Hanna *v.* Barrett, 39 Kan. 446, 18 Pac. Rep. 497.

4. McBride *v.* Floyd, 2 Bailey (S. C.) 209; Kincaid *v.* Neall, 3 McCord (S. C.) 201; Copeland *v.* Piedmont, etc., Ins. Co., 17 S. C. 116; Metts *v.* Piedmont, etc., Ins. Co., 17 S. C. 120; Williams *v.* Walker, 11 Iowa 77; Zook *v.* Blough, 42 Mich. 487; Bank of Santa Fee *v.* Haskell Co. Bank, 54 Kan. 375, 38 Pac. Rep. 485.

5. Mendes *v.* Freiters, 16 Nev. 388; Cockrell *v.* McGraw, 33 Ala. 526; Schoppenhast *v.* Bollman, 21 Ind. 280; Williams *v.* Walker, 11 Iowa 77; Moore *v.* Stege, 93 Ky. 27, 18 S. W. Rep. 1019; Harper *v.* Scuddy, 1 McMull (S. C. L.) 264; Windt *v.* Banniza, 2 Wash. 147, 26 Pac. Rep. 189.

Under one statute it was held that the defendant might move to vacate the attachment, although he dis-

motion to discharge need not be as to all the attached property. He may have a part only released.[1]

In states permitting a special appearance of the defendant in an action, for certain purposes only, a defendant may move to quash a writ of attachment without submitting himself to the jurisdiction of the court, if he restrict his appearance to the sole purpose of making such motion.[2]

But where one other than the defendant is not permitted to have the attachment dissolved on motion because of irregularities, yet if it be illegal and void he will have a right to have the same dissolved by intervention or otherwise.[3]

The general rule is that any person not a party to the suit must, in order to have relief, proceed by intervention, yet many statutes specially provide that not only the defendant and garnishee, but third persons who have acquired an interest in the property attached, by lien or otherwise, will be heard upon a motion to dissolve the attachment, when the result would be the same as if otherwise obtained.[4] But in order to

claimed any interest in the attached property. Salmon *v.* Mills, 49 Fed. Rep. 333, 4 U. S. App. 101, 1 Cir. Ct. App. 278, or had since assigned it for benefit of creditors. Tolerton & Stetson Co. *v.* Casperson, (S. D.) 63 N. W. Rep. 908.

While under another it was held that an attachment could not be dissolved on application of the defendant, whose only interest in the attached property was what might remain after the mortgage was satisfied. McCord-Brady Co. *v.* Krause, 36 Neb. 764, 55 N. W. Rep. 215.

1. Quinlan *v.* Danford, 28 Kan. 507; Price *v.* Reed, 20 Mich. 72; Patterson *v.* Goodrich, 31 Mich. 225.

Therefore the order of dissolution should show whether it applies to the whole property or to what part. Ellsworth *v.* Scott, 3 Abb. (N. Y.) N. Cas. 9.

2. Johnson *v.* Buell, 26 Ill. 66; Rodolph *v.* Mayer, 1 Wash. T. 154; Manice *v.* Gould, 1 Abb. (N. Y.) Pr. N. S. 255; Tiffany *v.* Lord, 65 N. Y. 310; Bonner *v.* Brown, 10 La. Ann. 334; Kendall *v.* Brown, 7 La. Ann. 668; Holzman *v.* Martinez, 2 N. Mex. 271; Whiting *v.* Budd, 5 Mo. 443.

3. Walker *v.* Roberts, 4 Rich. (S. C.) 561.

4. Chase *v.* Foster, 9 Iowa 429; Clarke *v.* Meixsell, 29 Md. 221; Baird *v.* Williams, 19 Pick. (Mass.) 381; Randall *v.* Williams, 19 Pick. (Mass.) 381; Peirce *v.* Richardson, 9 Metc. (Mass.) 69; Henderson *v.* Thornton, 37 Miss. 448; Pendleton *v.* Smith, 1 W. Va. 16; Trow's Printing and B. B. Co. *v.* Hart, 85 N. Y. 500; Smith *v.* Davis, 29 Hun (N. Y.) 306; Capehart *v.* Dowery, 10 W. Va. 130; Long *v.* Murphy, 27 Kan. 375; Dearborn *v.* Vaughan, 46 Kan. 506, 26 Pac. Rep. 1038; Dolan *v.* Topping, 51 Kan. 321, 32 Pac. Rep. 1120; Wm. W. Kendall Boot and Shoe Co. *v.* August, 51 Kan. 53, 32 Pac. Rep. 635; McDonald *v.* Clark,

have his motion heard, his interest in the attached property must generally be shown.[1] And with him rests the burden of proof.[2]

Under such a law will be included assignees for the benefit of creditors, when they have a right to the possession of the property, although they be not parties to the suit,[3] or they may move to release a part only of the attached property and obtain an order for the dissolution as to such part.[4] Where a motion by one statutory assignee has been overruled and a motion to dissolve is made by his successor without leave of court, such a motion will be stricken from the files,[5] upon the doctrine that a motion once denied can not be renewed as a matter of right except upon facts arising subsequent to the ruling on the former motion.[6] It has been said, also, that the rule of law permitting an assignee to move to vacate an attachment does not allow such a motion by him when a similar motion has been theretofore made by the defendant and denied to him.[7]

53 Minn. 230, 54 N. W. Rep. 1118; Remington Paper Co. *v.* Louisiana Printing and Publishing Co. (C. C.) 56 Fed. Rep. 287.

One such state has said that a person having acquired a lien can not move upon the *irregularity* in attachment. Steuben County Bank *v.* Alberger, 21 Hun 109, 83 N. Y. 274. See *post*, § 353, "Evidence."

1. Delmore *v.* Owen, 44 Hun (N.Y.) 296.

2. Parlin *v.* Spencer, — Kan. —, 33 Pac. Rep. 363.

It is said in Texas that sureties on a replevin bond without claiming any right or authority to control or manage the suit, yet have a sufficient interest in the determination of it to move to quash the attachment. Burch *v.* Watts, 37 Tex. 135.

In Michigan a partner not implicated in the grounds upon which the attachment was issued, may have the attachment dissolved and the property restored to him. Edwards *v.* Hughes, 20 Mich. 289.

And where a husband and wife are jointly in possession of land owned by her and used as a homestead, he has such an interest therein as will entitle him to move for the dissolution of an attachment levied upon the land as his. Rowe *v.* Kellogg, 54 Mich. 206.

3. Wichita Wholesale Grocery Co. *v.* Records, 40 Kan. 119, 19 Pac. Rep. 346; Cahn *v.* Records, 40 Kan. 123, 19 Pac. Rep. 349; Chandler *v.* Nash, 5 Mich. 409; Bryce *v.* Foot, 25 S. C. 467.

4. Trow's Printing and Bookbinding Co. *v.* Hart, 85 N. Y. 500, s. c. 9 Daly (N. Y.) 413.

5. Hillyer *v.* Biglow, 47 Kan. 473, 28 Pac. Rep. 150.

6. Steuben Co. Bank *v.* Alberger, 83 N. Y. 274.

7. Strauss *v.* Vogt, (Supr. N. Y.) 24 N. Y. S. 483.

In Missouri the assignee, for the

Likewise a mortgagee of personal property who has obtained possession of it has such an interest therein as will entitle him under such a statute to move to dissolve an attachment brought by a third person against the mortgagor.[1]

A receiver is likewise included under a special statute in New York, when his interests are acquired subsequent to the issuance of the attachment,[2] but not when his title is acquired theretofore.[3]

A junior attaching creditor is likewise included as "a person who has acquired a lien upon or interest in the defendant's property," under the same statute in New York, but a motion to dissolve because of the irregularities in the prior attachment will not be entertained when his attachment is likewise insufficient.[4] In West Virginia also a subsequent attaching creditor may appear by petition and move to quash the pro-

benefit of creditors, should proceed, by intervention and not by motion, to dissolve. Boltz *v.* Eagon, 34 Fed. Rep. 445.

And in Georgia, one who has interposed a claim to the property levied upon may make a motion to vacate the attachment. Hines *v.* Kimball, 47 Ga. 587.

In Minnesota an insolvent who has made an assignment for the benefit of creditors has a reversionary interest in the property assigned, and may therefore move to vacate an attachment when issued on the ground of fraud. First Nat. Bank *v.* Randall, 38 Minn. 382, 37 N. W. Rep. 799.

In New York a defendant may move to vacate a provisional attachment as well after an assignment of his interest in the attached property as before the levy. Gasherie *v.* Apple, 14 Abb. (N. Y.) Pr. 64.

1. Hosea *v.* McClure, 42 Kan. 403, 22 Pac. Rep. 317, 319; Henry *v.* McClure, 22 Pac. Rep. 319. Compare Darst *v.* Levy, 40 Neb. 593, 58 N. W. Rep. 1130.

But in Alabama one merely claiming as a mortgagee under a mortgage executed after the attachment levy, and who is a stranger to the suit, can not move the court to dissolve the pending attachment on the ground of irregularities when the same has been pending for several terms. May *v.* Courtnay, 47 Ala. 185.

2. Shoe and Leather Bank *v.* Mechanics' Bank, 89 N. Y. 440.

3. Key West Bldg. & Loan Ass'n *v.* Bank of Key West, (Sup.) 18 N. Y. S. 390; Allen *v.* Bank of Key West, 18 N. Y. S. 391, 63 Hun (N. Y.) 633.

4. Hodgman *v.* Barker, 17 N. Y. S. 911, 63 Hun (N. Y.) 631; Barker *v.* Ft. Ann Woolen Co., 27 N. Y. S. 1114; Central Nat. Bank *v.* Ft. Ann Woolen Co., (Sup.) 24 N. Y. S. 640, s. c. 27 N. Y. S. 1114; Central Nat. Bank *v.* Ft. Ann Woolen Co., 143 N. Y. App. 624, 37 N. E. Rep. 827.

And he has the burden of showing affirmatively that his papers are sufficient to confer jurisdiction, and that his attachment was actually levied

ceedings, although his attachment may have been issued in another county.[1]

The dissolution of an attachment at the instance of third persons who claim an interest in the property attached is usually by way of an intervening petition and will receive more particular attention hereinafter.[2]

§ 345. (c) **When the motion must be made—Waiver.**[3]—The time within which a motion to dissolve an attachment must be made is largely controlled by special statutes, but on the principles of the common law it is the nature of a dilatory plea and should be made before pleading to the merits.[4] A plea in abatement, or any plea going to the merits, will be a waiver of exceptions which may be taken because of irregularities in form or substance of the affidavit, bond or writ, and of apparent irregularities in the issuance thereof.[5] And so will other acts,

upon the property covered upon the prior attachment, for otherwise he does not show that he is "a person who has acquired a lien," etc. Dayton *v.* McElwee Mfg. Co., (Sup.) 19 N. Y. S. 46, 22 Civil Proc. R. 227. What will be such a *prima facie* showing, see Pitts *v.* Scribner, (Sup.) 19 N. Y. S 519.

1. Pendleton *v.* Smith, 1 W. Va. 16.

2. See *post*, § 426.

3. In Minnesota a motion to vacate an *order* of attachment may be made prior to the levy. First Nat. Bank *v.* Randall, 38 Minn. 382, 37 N. W. Rep. 799.

4. Steamboat Farmer *v.* McCraw, 31 Ala. 659; Myers *v.* Perry, 1 La. Ann. 372; Brinegar *v.* Griffin, 2 La. Ann. 154; Ealer *v.* McAllister, 14 La. Ann. 821; Grey *v.* Young, Harp. (S. C.) 38; Callender *v.* Duncan, 2 Bailey (S. C.) Law 454.

It must be made at the first term it can be made. Hall *v.* Brazelton, 40 Ala. 406; Neal *v.* Bookout, 30 Ga. 40; Irvin *v.* Howard, 37 Ga. 18; Mittenberger *v.* Lloyd, 2 Dall. 79. But see Penman *v.* Gardner, 4 Yeates (Pa.) 6; Kearney *v.* McCullough, 5 Binn. (Pa.) 389; Tarbell *v.* Bradley, 27 Vt. 535. It must in Montana be made before time to answer. Magee *v.* Fogerty, 6 Mont. 237, 11 Pac. Rep. 668.

5. Williams *v.* Glassgo, 1 Nev. 533; Campbell *v.* Wilson, 6 Tex. 379; Dunn *v.* Crocker, 22 Ind. 324; Spaulding *v.* Simms, 4 Metc. (Ky.) 285; Hillyer *v.* Biglow, 47 Kan. 473, 28 Pac. Rep. 150; Bishop *v.* Fennerty, 46 Miss. 570; Carr *v.* Coopwood, 24 Miss. 256; Symons *v.* Northern, 4 Jones (N. C.) L. 241; Garmon *v.* Barringer, 2 Dev. & B. (N. C.) L. 502; Memphis, etc., R. Co. *v.* Wilcox, 48 Pa. St. 161; Judah *v.* Duncan, 2 Bailey (S. C.) L. 454; Stoney *v.* McNeill, Harper (S. C.) 156; Grey *v.* Young, Harper (S. C.) L. 38; Young *v.* Grey, Harper (S. C.) L. 38; Enders *v.* Steamer Henry Clay, 8 Rob. (La.) 30;

declarations or delays operating by way of estoppel.[1] But in Minnesota it is said that so long as the defendant's answer stands undisposed of, he may make a motion to dissolve the attachment.[2]

In Maryland a motion to quash an attachment because of subsequent defects in the proceeding may be entertained at any stage of the trial because it is a question that goes to the juris-

Ealer *v.* McAllister, 14 La. Ann. 821; Barry *v.* Foyles, 1 Pet. 311; Vaughn *v.* Dawes, 17 Pac. Rep. 114. *Contra*, Hyde *v.* Nelson, 11 Mich. 353; Michels *v.* Stork, 44 Mich. 2; Sheldon *v.* Stewart, 43 Mich. 574. See, also, Drs. K. & K. U. S. Medical & Surgical Assoc. *v.* Post, etc., Job Printing Co., 58 Mich. 487.

But it is not waived by a plea or answer merely denying the fraud alleged and not going to the merits of the case. Harrisburg Boot and Shoe Co. *v.* Johnson, (Pa. Com. Pl.) 3 Pa. Dist. R. 433. Nor is it under the Arkansas statutes by trial and verdict where the verdict has been set aside on a motion for a new trial. Salmon *v.* Mills, 4 U. S. App. 101, 1 Cir. Ct. App. 278, 49 Fed. Rep. 333.

Under such a rule it is, of course, waived by entering upon the trial of the case. Watson *v.* McAllister, 7 Martin (La.) 368; and will come too late if made after motion in arrest of default judgment. Norton *v.* Dow, 10 Ill. (5 Glim.) 459. Or after an appeal is taken from a judgment obtained in a lower court. Reynolds *v.* Simpkins, 67 Ala. 378; Voorhees *v.* Hoagland, 6 Blackf. (Ind.) 232; Wells *v.* St. Dizier, 9 La. Ann. 119.

But not so under a statute which permits it to be made at any time before an actual application of the attached property or the proceeds thereof to the payment of a judgment obtained in the action. Parsons *v.* Sprague, 65 How. (N. Y.) Pr. 151.

The giving of a bond to procure the release of attached property is sometimes held to be equivalent to an appearance, and therefore a waiver of the right to move for a dissolution of the attachment. See *ante*, §§ 288 and 304; Paddock *v.* Matthews, 3 Mich. 18.

But the more reasonable rule seems to be that where there is no legal right to attach there is no right to take a bond, and that the fact of having given a bond can not operate as a waiver or estoppel of the defendant's right to move to dismiss the attachment. Egan *v.* Lumsden, 2 Disney (Ohio) 168; Bruce *v.* Conyers, 54 Ga. 678; Glidden *v.* Whittier, 46 Fed. Rep. 437; Winters *v.* Pearson, 72 Cal. 553, 14 Pac. Rep. 304; Brinegar *v.* Griffin, 2 La. Ann. 154; Myers *v.* Perry, 1 La. Ann. 372; Avett *v.* Albo, 21 La. Ann. 349; Edwards *v.* Prather, 22 La. Ann. 334.

1. Payment *v.* Church, 38 Mich. 776; Dunn *v.* Crocker, 22 Ind. 324.

Agreeing that the sheriff may sell the attached property and hold the proceeds until final judgment will have such an effect. Wickham *v.* Nalty, 41 La. Ann. 284, 6 So. Rep. 123.

In North Carolina it may be made before the return term of the summons in the original suit. Wilson *v.* Louis Cook Mfg. Co., 88 N. C. 5.

2. First Nat. Bank *v.* Randall, 38 Minn. 382, 37 N. W. Rep. 799.

diction of the court.[1] In Arkansas, Nebraska and Kansas likewise it may be interposed at any time before final judgment.[2]

In Michigan it may be made after a judgment has been rendered in an action on the debt for the collection of which the attachment was sought, if the case was not tried on its merits.[3] And in New York likewise it may be made after entry of judgment and issue of execution (and even after the levy of execution and appeal from a justice's court,[4]) "at any time before the actual application of the attached property or the proceeds thereof."[5]

In Wisconsin the court has power to dissolve an attachment for an insufficiency of the affidavit at any time, even after judgment.[6]

Whenever the time within which a motion to dissolve an attachment may be made is limited by a statute, the motion must be made within such time or it will not be granted. Making a motion after the expiration of such time and calling it a "substituted motion" will not avoid the effect of the delay.[7] Such a statute refers to the application of the party complaining, and therefore when the same is made within the prescribed time, any delay or incompetency of the court will not effect the rights of the applicant.[8]

§ 346. (d) **Notice of motion.**—A judge has no authority to release property from an attachment lien on an *ex parte* application. The plaintiff must be duly notified and given an op-

1. Evesson *v.* Selby, 32 Md. 340.

2. Ward *v.* Carlton, 26 Ark. 662; Moline, Milburn and Stoddard Co. *v.* Curtis, 38 Neb. 520, 57 N. W. Rep. 161; Stutzner *v.* Printz, 43 Neb. 306; Doggett *v.* Bell, 32 Kan. 298; Frazer Boot and Shoe Co. *v.* Derse, 41 Kan. 150, 21 Pac. Rep. 167; Guest *v.* Ramsey, 50 Kan. 709, 33 Pac. Rep. 17.

3. Ray *v.* Gore, 73 Mich. 385, 41 N. W. Rep. 329.

4. Woodmansee *v.* Rogers, 82 N. Y. 88.

5. Parsons *v.* Sprague, 65 How. (N. Y.) Pr. 151, s. c. 30 Hun (N. Y.) 19; National Broadway Bank *v.* Barker, 14 N. Y. S. 529; Hodgman *v.* Barker, 14 N. Y. S. 574.

6. Goodyear Rubber Co. *v.* Knapp, 61 Wis. 103.

7. Magee *v.* Fogerty, 6 Mont. 237, 11 Pac. Rep. 668.

8. Bledsoe *v.* Wright, 58 Tenn. 471. The judgment is final (Sheppard *v.* Guisler, 10 Wash. 41), but new motion may be made on new facts and new papers. Sells Bros. Co. *v.* Potter Prod. Co., 80 Hun 554.

portunity to be heard.[1] The notice must specify the grounds of the motion and point out wherein it will be urged that the writ was improperly issued.[2] It is good practice to serve with the notice of motion copies of affidavits and papers which will be relied upon as grounds for the dissolution asked.[3]

§ 347. (e) **Essentials of the motion—Opposition thereto.**—The party applying for the dissolution of an attachment must not only be in a position to be entitled to an order for the restoration of the property,[4] but his motion papers must specify the grounds he relies upon therefor.[5] The irregularity or insufficiency must be explicitly pointed out,[6] and he must aver his right to have the property released.[7]

While it is the general rule, as hereinbefore stated,[8] that no errors other than those that appear upon the face of the proceedings, will be relieved upon motion, and that other defects can only be reached by a plea or its equivalent,[9] yet under the New York code an application to discharge or vacate an attachment may be made in furtherance of justice, upon the real merits of the application, or for irregularity, or for want of

1. Claflin *v.* Lisso, 31 La. Ann. 171; Field *v.* Parke, 20 Johns. (N. Y.) 140; Doggett *v.* Bell, 32 Kan. 298; Smith-Frazer Boot and Shoe Co. *v.* Derse, 41 Kan. 150, 21 Pac. Rep. 167; Guest *v.* Ramsey, 50 Kan. 709, 33 Pac. Rep. 17.

2. Freeburn *v.* Glazer, 10 Cal. 337.

3. In South Carolina, where a motion was made to vacate an attachment levied on the interest of a nonresident partner, a notice of motion was sufficient where the affidavits and papers served therewith showed that the attachment defendant was sued on a partnership debt with his copartner, that he owned no property in the state except his interest in the partnership effects, and that his interest had been attached, although it did not state that the motion would be made "on the ground" that an interest of a nonresident partner, in partnership effects was not liable to attachment. Whitfield *v.* Hovey, 30 S. C. 117, 8 S. E. Rep. 840.

In Wisconsin, what will be a sufficient copy of an order to show cause why an order should not be entered dismissing the action, see Harrison Mach. Works *v.* Hosig, 73 Wis. 184, 41 N. W. Rep. 70.

4. Price *v.* Reed, 20 Mich. 72; Patterson *v.* Goodrich, 31 Mich. 225; Zook *v.* Blough, 42 Mich. 487.

5. Blair *v.* Cleveland, 1 Stew. (Ala.) 421; Freeborn *v.* Glazer, 10 Cal. 337; Osborne *v.* Robbins, 10 Mich. 277; Cupit *v.* Park City Bank, (Utah) 37 Pac. Rep. 564; Cupit *v.* Bank of Park City, (Utah) 40 Pac. Rep. 707.

6. Windt *v.* Banniza, 2 Wash. 147, 26 Pac. Rep. 189.

7. Johnson *v.* DeWitt, 36 Mich. 95; Macumbar *v.* Beam, 22 Mich. 395.

8. See *ante*, § 338.

9. See *post*, § 348, and Kohler *v.* Agassiz, 99 Cal. 9, 33 Pac. Rep. 741.

jurisdiction in the officer who granted it, or for fraud in obtaining it, or for defective papers, or for any other cause.[1] And in South Dakota a defendant may unite in one motion, as grounds for the discharge of the attachment, the objections that the affidavit is insufficient in form of substance and that it is untrue in fact.[2]

In opposition to a motion to dissolve an attachment because of irregularities appearing on the face thereof, the plaintiff is confined to a narrow limit. When a motion is made to procure the dissolution of attachment, on the ground of defective papers on which the attachment was granted, the plaintiff can not introduce additional affidavits or proof to support his attachment. It must stand upon the merits of the original papers or fall because of their defects.[3]

§ 348. **Dissolution by denial of plaintiff's right to attachment—(a) General principles.**—It is a fundamental principle of law of attachment in most states that before any valid attachment can be made, one of the statutory grounds therefor must actually exist. And that while the averment of such a ground in the affidavit may be sufficient for the issuance of the writ,[4] yet the ability of the plaintiff to sustain his attachment on dissolution proceedings will depend upon the truth of

1. Rowles *v.* Hoare, 61 Barb. (N. Y.) 266. Also *post*, § 351.

As to what questions the court will try on the hearing of such a motion, see Lowenstein *v.* Salinger, 17 N. Y. S. 70, 62 Hun (N. Y.) 622.

2. Wilcox *v.* Smith, (S. D.) 55 N. W. Rep. 1107.

3. Steuben County Bank *v.* Alberger, 56 How. (N. Y.) Pr. 345; Genin *v.* Tompkins, 12 Barb. (N. Y.) 265; Wilson *v.* Britton, 6 Abb. (N. Y.) Pr. 33; Brewer *v.* Tucker, 13 Abb. (N. Y.) Pr. 76; Sutherland *v.* Bradner, 34 Hun (N. Y.) 519; Thames, etc., Co. *v.* Dimmick, 22 N. Y. S. 1096, 66 Hun (N. Y.) 734; Head *v.* Wollner, 6 N. Y. S. 916; Trows Printing, etc., Co. *v.* Hart, 60 How. (N. Y.) Pr. 190; Newell *v.* Whitwell, (Mont.) 40 Pac. Rep. 866.

4. Since the jurisdiction of the court depends upon the affidavit of the plaintiff's belief of the non-residence of the defendant, it follows that if such an affidavit is regular, and made in good faith a court can not *collaterally* inquire into the fact of non-residence and declare the proceedings void. Weber *v.* Weitling, 18 N. J. Eq. (3 Green.) 441. The question must be raised at the proper time during the pendency of the proceedings, for if material allegations are not denied they must be taken to be true. Wehle *v.* Kerbs, 6 Colo. 167. *Post*, § 351.

the facts averred as a ground therefor.[1] Therefore it is competent always in such states to inquire, in some manner into the truth of the statements made to obtain a writ of attachment.[2] And the question at issue on such inquiry is not the belief of the affiant in the existence of the facts, but is the existence of the facts themselves.[3]

§ 349. (b) **How such denial interposed.**—The most general course pursued to obtain a dissolution of the attachment by denial of the existence of the ground alleged for the issuance thereof, is by way of a plea in abatement,[4] or by a plea in

1. Capehart *v.* Dowery, 10 W. Va. 130; Bundrem *v.* Denn, 25 Kan. 430; *ante*, § 86.

2. Clarke *v.* Meixsell, 29 Md. 221; Branson *v.* Shinn, 13 N. J. L. (1 Green.) 250; Boyes *v.* Coppinger, 2 Yeates (Pa.) 277.

In a few states the defendant is not allowed to call in question the truth of the affidavit on which the attachment issued. Mandel *v.* Peet, 18 Ark. 236; Taylor *v.* Ricards, 9 Ark. 378; Cloud *v.* Smith, 1 Tex. 611; Miller *v.* Chandler, 29 La. Ann. 88; Hermann *v.* Amedee, 30 La. Ann. 393.

3. Chenault *v.* Chapron, 5 Mo. 438. Sublett *v.* Wood, 76 Va. 318; Foster *v.* Illinski, 3 Ill. App. 345; Rice *v.* Morner, 64 Wis. 599; Davidson *v.* Hackett, 49 Wis. 186; Alexander *v.* Brown, 2 Disney (Ohio) 395.

4. Bates *v.* Jenkins, 1 Ill. (Breese) 411; Schulenberg *v.* Farwell, 84 Ill. 400; Boggs *v.* Bindskoff, 23 Ill. 66; Bennett *v.* Zabriskie, 2 N. Mex. 7; Wrompelmeir *v.* Moses, 3 Baxter (Tenn.) 467; Waggoner *v.* St. John, 10 Heisk. (Tenn.) 503; Mantz *v.* Hendley, 2 Hen. & M. (Va.) 308; Bank of the Valley *v.* Bank of Berkeley, 3 W. Va. 386; Ouzts *v.* Seabrook, 47 Ga. 359; Leak *v.* Moorman, Phill. (N. C.) L. 168; Claussen *v.* Easterling, 19 S. C. 515; Searcy *v.* Platte County, 10 Mo. 269; Havis *v.* Trapp, 2 Nott. & M. (S. C.) 130; Mayhew *v.* Dudley, 1 Pinney (Wis.) 95; Collins *v.* Nichols, 7 Ind. 447; Foster *v.* Dryfus, 16 Ind. 158; Brown *v.* Marsey, 3 Stew. (Ala.) 226; Middlebrook *v.* Ames, 5 Stew. & Porter (Ala.) 158; Brown *v.* Coats, 56 Ala. 439.

In Alabama the want of a bond and affidavit is subject-matter for plea in abatement. Jones *v.* Pope, 6 Ala. 154; Free *v.* Howard, 44 Ala. 195; Free *v.* Hukill, 44 Ala. 197; Kirkman *v.* Patton, 19 Ala. 32.

And in Arkansas it is held that the want of a bond, or of a proper bond, is pleadable in abatement to the whole suit. Delano *v.* Kennedy, 5 Ark. 457.

But in Texas the want of a bond and affidavit can only be questioned by a motion to quash the attachment. Messner *v.* Hutchins, 17 Tex. 597; Roos *v.* Lewyn, 5 Tex. Civ. App. 593, 23 S. W. Rep. 450.

Also it seems that the objection that the person who made the affidavit or executed the bond as agent for the plaintiff had no authority so to do, must be made by plea in abatement to the writ. City Nat. Bank *v.* Cupp, 59 Tex. 268.

the nature of a plea in abatement.[1] It can not be effected by demurrer to the writ;[2] nor by demurrer to the declaration.[3]

§ 350. (c) Who may question the right to attachment.— The debtor alone is the person to whom belongs the right to question the existence of the plaintiff's alleged grounds for attachment. It may not be done by a creditor who claims a fund resulting from the sale of the property nor by a subsequent attaching creditor.[4] The rights of third persons must be urged in some other manner. The common law courts are

1. Mense *v.* Osbern, 5 Mo. 544; Graham *v.* Bradbury, 7 Mo. 281; Swan *v.* O'Fallon, 7 Mo. 231; Diner *v.* Courtney, 7 Mo, 500; Hatry *v.* Shuman, 13 Mo. 547; Cannon *v.* McManus, 17 Mo. 345; Haselton *v.* Ausherman, 29 Mo. App. 451.

In Wisconsin it is done by an answer which, in its nature, is like a common law plea in abatement, but it need not separately deny each fact stated in the affidavit. A general denial is sufficient. Armstrong *v.* Blodgett, 33 Wis. 284.

In Iowa it is by motion to quash. Halloway *v.* Herryford, 9 Iowa 353.

In Michigan the truth of facts stated in the affidavit are questioned on a motion made before a judge or circuit court commissioner as provided by the statute. Roelofson *v.* Hatch, 3 Mich. 227. Bower *v.* Town, 12 Mich. 230.

In Louisiana the falsehood of the affidavit is brought to the attention of the court by a rule on the plaintiff to show cause why the attachment should not be dismissed. Read *v.* Ware, 2 La. Ann. 498.

In Alabama, an attachment issued for a cause if not warranted by the statute, can not be reached by plea in abatement. It must be by rule on the plaintiff to show cause why the writ and levy should not be dissolved and must precede a plea to the merits. Drakford *v.* Turk, 75 Ala. 339; Adair *v.* Stone, 81 Ala. 113; Rich *v.* Thornton, 69 Ala. 473; Brown *v.* Cotes, 56 Ala. 439.

2. Roberts *v.* Burke, 6 Ala. 348.

3. Jordan *v.* Hazard, 10 Ala. 221.

Essentials of the plea. In Tennessee such a plea in abatement must be verified by written oath and must contain positive form of statement. A statement on information and belief is not sufficient. Wrompelmeir *v.* Moses, 3 Baxter (Tenn.) 467. But in Georgia, Kansas and Missouri this is not necessary. Ouzts *v.* Seabrook, 47 Ga. 359; Wm. W. Kendall Boot and Shoe Co. *v.* August, 51 Kan. 53, 32 Pac. Rep. 635; Swain *v.* O'Fallon, 7 Mo. 231. In Virginia a plea in abatement should not conclude with praying judgment if the plaintiff ought not to maintain his attachment and action, but that the attachment be quashed. Mantz *v.* Hendley, 2 Hen. and M. (Va.) 308.

4. First Nat. Bank *v.* Greenwood, 79 Wis. 269, 45 N. W. Rep. 810; Goodbar *v.* City Nat. Bank, 78 Tex. 461, 14 S. W. Rep. 831; Foster *v.* Higginbotham, 49 Ga. 263.

always open to an action of replevin in such cases, but to relieve such claimant from the expense of an independent proceeding, many statutes permit him to come into the case and be heard on an intervening petition.[1]

§ 351. (d) **When denial may be interposed.** — Following the general rule of common law pleading, that dilatory pleas must be interposed before the filing of a plea in bar, it is held that by filing a plea or answer going to the merits of the action the defendant waives his right to file a plea in abatement or a plea in the nature of a plea in abatement.[2] But in Indiana, Illinois and Georgia two defenses, one denying the right to have an attachment to enforce the payment of the alleged demand, and the other denying the existence of a legal demand, are said to be perfectly consistent, because one goes to the writ, and the other to the declaration; and for this reason both sets of issues may be there embraced together and all tried at the same time before the same jury.[3] But the contrary rule obtains in Missouri.[4]

It may be said to be the general rule that giving a bond to obtain the possession of the attached property is not a waiver of a party's right to show that the facts on which the attachment was obtained are unfounded, or that the property seized did not belong to him.[5]

§ 352. (e) **Trial of issues raised by denial of grounds of attachment.**—The trial of the sufficiency of the alleged grounds for attachment, as raised by plea in abatement or its equiva-

1. See *post*, § 426, "Interveners."

2. Green *v.* Craig, 47 Mo. 90; Sharkey *v.* Williams, 20 Mo. App. 681; Kritzer *v.* Smith, 21 Mo. 296; Hatry *v.* Shuman, 13 Mo. 547; Lewinthal *v.* Mississippi Mills, 55 Miss. 110; Woodruff *v.* Sanders, 18 Wis. 161; Waggoner *v.* St. John, 10 Heisk. (Tenn.) 503; Meggs *v.* Shaffer, Hardin (Ky.) 65.

When a statute prescribes the time within which the traverse of the affidavit must be made the same must of course be strictly observed. Neal *v.* Bookout, 30 Ga. 40; Irwin *v.* Howard, 37 Ga. 18.

3. Foster *v.* Dryfuss, 16 Ind. 158; Hawkins *v.* Albright, 70 Ill. 87; Parker *v.* Brady, 56 Ga. 372.

4. Cannon *v.* McManus, 17 Mo. 345.

5. *Ante*, §§ 288 and 304; Bauer *v.* Antoine, 22 La. Ann. 145; Quine *v.* Mayes, 2 Rob. (La.) 510.

lent, should be separate from the trial of the principal action.[1] For if judgment in the main action be entered prior to the trial of the traverse of the right of attachment it will be vacated at the first term thereafter.[2] It may be tried by the court,[3] without the aid of a jury;[4] or a jury may generally be impanelled to try the issues of fact.[5] And if a jury be demanded, the trial must be in the county where the suit is pending.[6]

§ 353. (f) **Evidence, burden of proof.**—When an application is made for the dissolution of an attachment, proof to procure it must be good and strong.[7] The matters relied on must be distinctly and unequivocally stated,[8] showing a satisfactory and clear right to have the attachment discharged.[9] Some states confine the evidence upon the issues raised to affidavits and counter affidavits, some permit a trial of the issues upon oral evidence and some upon either oral testimony or by affidavit. In a state of the latter class it has been held that where the defendant supports his application for a discharge of the attachment by affidavit, he can not thereafter depart from that

1. Price *v.* Bescher, 12 Heisk. (Tenn.) 372; Gowen *v.* Hanson, 55 Wis. 341; Allen *v.* Champlin, 32 La. Ann. 511.

Except where allowable to be tried at the same time. Foster *v.* Dryfuss, 16 Ind. 158; Hawkins *v.* Albright, 70 Ill. 87.

2. Davidson *v.* Hackett, 45 Wis. 208.

3. Gowan *v.* Hanson, 55 Wis. 341.

Also by a court commissioner when so provided by statute. Genessee Sav. Bank *v.* Michigan B. Co., 52 Mich. 164.

4. Gover *v.* Barnes, 15 Md. 576.

5. Forbes *v.* Porter, 25 Fla. 362, 6 So. Rep. 62; Stewart *v.* Katz, 30 Md. 334; Howard *v.* Oppenheimer, 25 Md. 350; Harmon *v.* Jenks, 84 Ala. 74, 4 So. Rep. 260.

But in Wyoming it is held that neither the article of the Constitution of the United States providing for trial by jury "in suits at common law" nor the statutes of the state, providing that in actions for the recovery of money or specific property, the issues of fact may be tried by a jury, will entitle an attachment defendant to a trial by jury on an application for dissolution. Wearne *v.* France, 3 Wyo. 273, 21 Pac. Rep. 703. Likewise, in Washington a jury can not be demanded. Windt *v.* Banniza, 2 Wash. 147, 26 Pac. Rep. 189.

And where tried at the same time with the main action the jury determines the facts. Foster *v.* Dryfuss, 16 Ind. 158; Hawkins *v.* Albright, 70 Ill. 87.

6. Canova *v.* Colby, 16 Fla. 167.

7. Moore *v.* Angiolette, 12 Martin (La.) 532.

8. Cain *v.* Jennings, 3 Tenn. Ch. 131.

9. McLaren *v.* Hall, 26 Ia. 297.

manner of proof and support it by oral testimony.[1] Where it is provided that the evidence shall or may be by affidavit, it is usually in a state providing specially for the denial of the right to have an attachment upon a "motion" and not upon a plea;[2] and under a provision that objections going to the merits of the alleged grounds for attachment may be included in the same application with objections going to irregularities in the attachment papers, and the issue of the attachment. But the general principles of evidence are the same as govern motions to dissolve because of irregularity, and pleas denying the grounds for attachment. If the defendant moves on the original papers only, his proof is confined to this and the plaintiff can not introduce affidavits to sustain his attachment.[3]

Where the defendant applies for a dissolution by denying the existence of the grounds for attachment and supports his application by affidavit, the plaintiff may read additional affidavits to those on which his attachment was issued; for the question is not then one of jurisdiction, but one of fact.[4] The

1. Hansen *v.* Doherty, 1 Wash. St. 461, 25 Pac. Rep. 297.

But in Kansas the defendant was permitted to cross-examine the plaintiff, although the affidavits of both parties were before the court. Tyler *v.* Safford, 24 Kan. 580.

2. Wearne *v.* France, 3 Wyo. 273, 21 Pac. Rep. 703.

3. Trow's, etc., Co. *v.* Hart, 60 How. (N. Y.) Pr. 190; Thames, etc., Co. *v.* Dimmick, 66 Hun (N. Y.) 634; Sutherland *v.* Bradner, 34 Hun (N. Y.) 519; Steuben County Bank *v.* Alberger, 56 How. (N. Y.) Pr. 345; Dickinson *v.* Benham, 10 Abb. (N. Y.) Pr. 390.

The defendant may properly use his verified answer for the purpose of an affidavit so far as its contents are pertinent. Nelson *v.* Munch, 23 Minn. 229.

In Wyoming the denial of the insufficiency of the plaintiff's affidavit raises, among other questions, the *sufficiency of the* statement of the ground for attachment. First Nat. Bank *v.* Swan, 3 Wyo. 356, 23 Pac. Rep. 743.

4. Allen *v.* Meyer, 73 N. Y. 1; Houghton *v.* Ault, 16 How. (N. Y.) Pr. 77; Hill *v.* Bond, 22 How. (N. Y.) Pr. 272; Gasherie *v.* Apple, 14 Abb. (N. Y.) Pr. 64; Furman *v.* Walters, 13 How. (N. Y.) Pr. 348; New York and Erie Bank *v.* Codd, 11 How. (N. Y.) Pr. 221; Bank of Commerce *v.* Rutland, etc., R. R. Co., 10 How. (N. Y.) Pr. 1; St. Armant *v.* De Beixcedon, 3 Sandf. (N. Y.) 703; Genin *v.* Tompkins, 12 Barb. (N. Y.) 265; Morgan *v.* Avery, 7 Barb. (N. Y.) 656; Yates *v.* North, 44 N. Y. 271; First Nat. Bank *v.* Swan, 3 Wyo. 356, 23 Pac. Rep. 743; Baer *v.* Otto, 34 Ohio State 11; Johnson *v.* Laughlin, 7 Kan. 359; Hanna *v.* Barrett, 39 Kan. 446, 18 Pac. Rep. 497.

He can not show by his opposing affidavits any additional act, as of

rule is (in states permitting a motion to discharge because of irregularities, to be united in an application to discharge because of insufficient grounds) that when the moving affidavit contains new matter the plaintiff will be allowed to read counter-affidavits, and affidavits in support of the original order granting the attachment.[1]

But the plaintiff's counter-affidavits should be confined to such matters as will contradict or explain the affidavits of the moving party, and not such as will remedy the defects in the papers,[2] for that is the province of an amendment.

The rules of evidence, when affidavits are relied upon in dissolution proceedings, are the same as when oral testimony is offered to contradict the alleged grounds for attachment. If the defendant by affidavit denies the truth of the alleged grounds, the plaintiff should be required to file such evidence as he desires, after which the defendant should file such evidence as he may see fit in contradiction thereof, and then the plaintiff should be allowed to file rebutting affidavits.[3]

On a denial of the grounds for attachment, *i. e.*, of the truth of the facts stated in the plaintiff's affidavit, the court is not confined to the question whether the attachment ought to have

fraud, in support of his application for attachment, but he may show facts which have taken place since his original application was made, tending to show a change in the relation and condition of the parties which affected the right to apply for dissolution. Dickinson *v.* Benham, 12 Abb. (N. Y.) Pr. 158, 20 How. (N. Y.) Pr. 343.

Depositions may be used in evidence although they be taken upon insufficient notice, for being written declarations of the witnesses upon oath, they fulfill the requirements of the affidavit without notice. Hanna *v.* Barrett, 39 Kan. 446, 18 Pac. Rep. 497; Talbot *v.* Pierce, 14 B. Mon. (Ky.) 158.

1. Buell *v.* Van Camp, 6 N. Y. S. 365; Steuben County Bank *v.* Alberger, 56 How. (N. Y.) Pr. 345.

The plaintiff is not entitled, as a matter of right, in Kansas, to notice from the defendant that affidavits will be used on the hearing of an application to dissolve an attachment for want of sufficient grounds. Myer Bros. Drug Co. *v.* Malm, 47 Kan. 762, 28. Pac. Rep. 1011.

The plaintiff may read affidavits identifying the affidavits on which the attachment was granted. Hallock *v.* Van Camp, 8 N. Y. S. 588, 55 Hun (N. Y.) 1.

2. Yates *v.* Griffith, 44 N. Y. 271; Rowles *v.* Hoare, 61 Barb. (N. Y.) 266; New York and Erie Bank *v.* Codd, 11 How. (N. Y.) Pr. 221; Wilson *v.* Britton, 6 Abb. (N. Y.) Pr. 33.

3. Jordan *v.* Dewey, (Neb.) 59 N. W. Rep. 88.

been issued on the original papers, as it is on a motion to dissolve for irregularity ;[1] nor will the court on the other extreme try the merits of the main action. The only question to be determined is whether, on the facts as presented, the plaintiff's attachment will or will not be sustained.[2] But this rule will not prevent the defendant from stating any pertinent fact tending to explain the transaction out of which the suit arose, although in doing so he make it appear that the amount stated to be due is too large.[3]

The burden of proof, where the attachment defendant does in some proper mode negative the truth or existence of the facts alleged in the affidavit to give ground for the issuance of the plaintiff's attachment, rests upon the plaintiff. Every fact by which the defendant may show that the attachment was improperly issued is cognizable by the court, and evidence *dehors* the proceeding may be resorted to.[4] The burden being upon the plaintiff to show why the attachment should not be discharged, he must by preponderance of competent evidence establish the existence of facts justifying the issuing of the writ or his attachment will be dissolved.[5] The positive denial on oath of the defendant will procure a dissolution, if the plaint-

1. *Ante*, § 348.

2. O'Reilly *v.* Freel, 37 How. (N. Y.) Pr. 272; Genin *v.* Tompkins, 12 Barb. (N.Y.) 265; Boscher *v.* Roullier, 4 Abb. (N. Y.) Pr. 396; Nelson *v.* Gibbs, 18 Minn. 541; Hamilton *v.* Johnson, 32 Neb. 730, 49 N. W. Rep. 702; Carnahan *v.* Gustine, (Okl.) 37 Pac. Rep. 594.

3. Hamilton *v.* Johnson, 32 Neb. 730, 49 N. W. Rep. 702.

4. Campbell *v.* Morris, 3 Har. & M. (Md.) 535; Gover *v.* Barnes, 15 Md. 576; S. P. Talbot *v.* Pierce, 14 B. Mon. (Ky.) 195.

5. Ridgeway *v.* Smith, 17 Ill. 33; Champion Mach. Co. *v.* Updyke, 48 Kan. 404, 29 Pac. Rep. 573; Wholesale Grocery Co. *v.* Records, 40 Kan. 119, 19 Pac. Rep. 346; Becker *v.* Langford, 39 Kan. 35, 17 Pac. Rep. 648; Conner *v.* Comrs. of Rice Co., 20 Kan. 575; Herman *v.* Amedee, 30 La. Ann., Part I, 393; Genessee Co. Sav. Bank *v.* Michigan Barge Co., 52 Mich. 164; Swan *v.* O'Fallon, 7 Mo. 231; Dolan *v.* Armstrong, 35 Neb. 339, 53 N.W. Rep. 132; Steele *v.* Dodd, 14 Neb. 496; Coston *v.* Paige, 9 Ohio St. 397; Wyman *v.* Wilmarth, 1 S. D. 35 and 172, 46 N. W. Rep. 190; Wilcox *v.* Smith, (S. D.) 55 N. W. Rep. 1107; Godbe Pitts Drug Co. *v.* Allen, 8 Utah 117, 29 Pac. Rep. 881; Sublett *v.* Wood, 76 (1 Hansb.) Va. 318. Citizens' State Bank *v.* Baird, 42 Neb. 219, 60 N. W. Rep. 551.

A refusal of the plaintiff to introduce evidence supporting the averment of his alleged grounds will entitle the defendant to a dissolution. Mitchell *v.* Carney, 41 Kan. 139, 21 Pac. Rep. 158.

iff's averments made to procure the attachment are not supported by competent evidence.[1] But if several grounds are alleged the attachment will not be dissolved unless they are all denied; for one ground is sufficient to maintain an attachment.[2] A mere reiteration of the general statement of his orig-

1. Hilton *v.* Ross, 9 Neb. 406; Miller *v.* Godfrey, 1 Colo. App. 177, 27 Pac. Rep. 1016; Rickel *v.* Strelinger, (Mich.) 60 N. W. Rep. 307.

Where, however, the rule obtains that a court will not vacate an attachment unless there is an entire absence of fact to authorize it, the plaintiff is not bound to file rebutting affidavits in order to have the benefit of such rule. He may reply upon his former attachment papers for that purpose. Brown *v.* Wigton, 63 Hun (N. Y.) 633, 18 N. Y. S. 490.

2. Tucker *v.* Frederick, 28 Mo. 574; Keith *v.* Stetter, 25 Kan. 100; Dumay *v.* Sanchez, 71 Md. 508, 18 Atl. Rep. 890; Jones *v.* Meyer, (S. D.) 63 N. W. Rep. 773; *ante*, §§ 142 and 145.

Non-residence alleged by the plaintiff as a ground for attachment will not be denied by the defendant's affidavit of residence. Further evidence must be procured. Shadduck *v.* Marsh, 21 N. J. L. 434; Shrewsbury *v.* Pearson, 1 McCord (S.C.), 331. But an attachment on the statutory ground that the defendant did not reside within the county in which the writ issued "at the time of the issuing thereof" was dismissed on a showing that he was within the county on the day the writ was issued, although the sheriff's return stated that the defendant was not found. Kaufman *v.* Musin, (Pa. Com. Pl.) 9 Pa. Co. Ct. Rep. 414. It will not be controverted as a ground for attachment by showing that the defendant has since become a resident. Larimer *v.* Kelley, 10 Kan. 298; Offutt *v.* Edwards, 9 Rob. (La.) 90; Simmons *v.* Jacobs, 15 La. Ann. 425. But the defendant may show that although he has a fixed abode in another state he still has his domicile in this state with an intention to return, and that he has left his family, upon whom process could be served, etc. Bowers *v.* Ross, 55 Miss. 231.

Absconding as a ground for attachment implies a departure with *intent* to injure or defraud. See *ante*, § 87. Therefore the plaintiff must prove that the defendant left home with an intent to abscond. Branson *v.* Shinn, 13 N. J. L. 250; Hoss *v.* Williams, 24 La. Ann. 568; Eaton *v.* Wells, 18 Minn. 410; Folsom *v.* Teichner, 27 Mich. 107. And it will be contradicted by showing that he left home for an honest purpose. City Bank *v.* Merrit, 13 N. J. L. 131; Garlinghouse *v.* Mulvane, 40 Kan. 428, 19 Pac. Rep. 798. Or that he was served with process. Temple *v.* Cochran, 13 Mo. 116. In one case the court refused to dissolve a domestic attachment where there was strong circumstantial evidence that the departure was with the design to defraud when the defendant had declared he went away to collect debts. Gibson *v.* McLaughlin, Browne, Pa. 292.

Removal as a ground for attachment resembles "absconding." See *ante*, § 106. And the averment that the defendant has removed or is about to remove himself or property must be proven by the plaintiff by a preponderance of evidence. Filing an affidavit denying the charges of fraud made by the plaintiff will entitle the defendant to a dissolution unless the plaintiff make further proof. McPike *v.* Atwell, 34

inal affidavit in the language of the statute, or statement of

Kan. 142. As to what evidence has sustained the plaintiff's allegations, see O'Reilly *v.* Freel, 37 How. (N. Y.) Pr. 272; Livermore *v.* Rhodes, 27 How. (N. Y.) Pr. 506; Dickinson *v.* Benham, 12 Abb. (N. Y.) Pr. 158; Gasherie *v.* Apple, 14 Abb. (N. Y.) Pr. 64; Swezey *v.* Bartlett, 3 Abb. (N. Y.) Pr. n. s. 444. But a defendant's affidavit, when contradicted by the affidavits of four other persons based upon the defendant's acts and declaration, will not procure a dissolution. William Deering & Co. *v.* Warren, 1 S. D. 35, 44 N. W. Rep. 1068. An attachment on the ground that the defendant is about to remove the property from the state will be dissolved on showing by affidavit that the property was exempt. Hastings *v.* Phœnix, 59 Iowa 394.

Fraud as a ground for attachment must be proven by a preponderance of testimony on the part of the plaintiff when the alleged acts constituting the fraud are denied by the defendant's affidavit. Towle *v.* Lamphere, 8 Ill. App. 399; Robinson *v.* Melvin, 14 Kan. 484; Cuendet *v.* Lahmer, 16 Kan. 527; Hodson *v.* Tootle, 28 Kan. 317; Iosco County Sav. Bank *v.* Barnes, 100 Mich. 1, 58 N. W. Rep. 606; Meyer *v.* Evans, 27 Neb. 367, 43 N. W. Rep. 109; Strauss *v.* Abraham, 32 Fed. Rep. 310; Burrus *v.* Trant, 88 Va. 980, 14 S. E. Rep. 845; Kenny *v.* Wallace, 87 Ga. 724, 13 S. E. Rep. 744; Kahn *v.* Angus, 61 Wis. 264; Estes *v.* Chesney, 54 Ark. 463, 16 S. W. Rep. 267.

If the plaintiff's affidavit for attachment contain a general averment of fraud and the same be denied by the defendant in general terms, the plaintiff has then the burden of showing at the hearing, by deposition or otherwise, specific acts of fraud or fraudulent intent on the part of the defendant. Wells *v.* Hogan, (Pa. Com. Pl.) 2 Pa. Dist. R. 98. A fraudulent purchase of a part of the goods only will not be sufficient to procure a dissolution. Dolan *v.* Armstrong, 35 Neb. 339, 53 N. W. Rep. 132; *ante*, § 125. If the fraudulent representations relied on were not made by the defendant, nor by his authority, the attachment will be dismissed. Lodge *v.* Rose Valley Mills, (Pa. Com. Pl.) 11 Pa. Co. R. 667; Lodge *v.* Rose Valley Mills, (Pa. Com. Pl.) 1 Pa. Dist. R. 811. That a general negation of general averments in the affidavit will not put such allegations in issue, see Hanson *v.* Doherty, 1 Wash. 461, 25 Pac. Rep. 297.

Secretion or disposal of "property" with intent to defraud does not necessitate proof of a secretion or disposal of all the defendant's property. Weiller *v.* Schreiber, 63 How. (N. Y.) Pr. 491. And an affidavit by the defendant that he never designed "selling and disposing of" his property to defraud his creditors, and that he intended to sell and dispose of it only in the regular course of trade is sufficient to place the burden of proof upon the plaintiff. Noyes *v.* Lane, 1 S. D. 125, 45 N. W. Rep. 327; Lord *v.* Wirt, 96 Mich. 415, 56 N. W. Rep. 7; Smith *v.* Boyer, 29 Neb. 76, 45 N. W. Rep. 265. But if the defendant fail to deny the charge of secretion, although he deny other alleged grounds for attachment the dissolution will be refused. Hornick Drug Co. *v.* Lane, 1 S. D. 129, 45 N. W. Rep. 329.

Where an effort is made to have an attachment dissolved which has issued on the ground of fraud under a statute requiring the averment of the facts constituting the fraud, the dissolution

opinion or belief, is not sufficient.[1] But when supporting evidence is given which is fairly preponderating the attachment will not be vacated.[2] Nor will the court dissolve an attachment in a doubtful case.[3]

Where the plaintiff has alleged that the defendant has done certain acts which give a ground for attachment, the court, in proceedings to dissolve the attachment inquires whether the defendant has actually done as the plaintiff believes, for though the fact that the plaintiff had good reason to believe a proper ground existed will be sufficient for the issuance of the writ, the existence of reasons for his belief is not in issue in proceedings for dissolution and will not support the attachment.[4]

After the defendant has made a showing to procure a dissolution of the attachment, the plaintiff has a right to introduce evidence in rebuttal and the court can not disregard such proof introduced by the plaintiff without making such proceedings fail on appeal.[5]

The right to open and close is with the attachment plaintiff when the defendant has moved the court to dissolve the attachment; because the burden of proof rests upon the plaintiff. He is entitled to the opening and closing argument,[6] and may be required to produce his evidence first.[7]

will not be granted unless the alleged acts are denied, for a failure to deny them admits, for the purpose of the proceeding, the truth of the affidavit which is sufficient in itself to warrant the issuance of the attachment. Wickham *v.* Stern, 9 N. Y. S. 803, 18 Civ. Proc. Rep. 63; Rothschild *v.* Mooney, 13 N. Y. S. 125, 59 Hun 622. That the plaintiff under such a statute can not prove the existence of the facts authorizing the issuing of the attachment by other affidavits, but must rely on the original papers upon which the writ was granted, see Appleton *v.* Speer, 57 N. Y. Sup. Ct. 119; 6 N. Y. S. 511, and Myers *v.* Whiteheart, 24 S. C. 196.

1. Jones *v.* Swenk, 51 Minn. 285; 53 N. W. Rep. 634.

2. Walton *v.* Chadwick, (Super. N. Y.) 26 N. Y. S. 789, 6 Misc. R. 293.

3. Shrewsbury *v.* Pearson, 1 McCord (S. C.) 331.

4. Blanchard *v.* Brown, 42 Mich. 46; Folsom *v.* Teichner, 27 Mich. 107; Rheinhart *v.* Grant, 24 Mo. App. 154.

5. Cahen *v.* Mahoney, (Cal.) 12 Pac. Rep. 300.

6. Gibson *v.* McLaughlin, 1 Browne (Pa.) 292; Olds W. Co. *v.* Benedict, 25 Neb. 372; Jordan *v.* Dewey, 40 Neb. 639, 59 N. W. Rep. 88.

7. Wright *v.* Rambo, 21 Gratt. (Va.) 158; Sublett *v.* Wood, 76 Va. 318.

§ 354. **Judgment dissolving attachment—Effect thereof.**—In proceedings to obtain the dissolution of the attachment the judgment will be in most states merely that the writ abate or that the attachment proceedings be dismissed at the cost of the plaintiff.[1] The judgment dissolving the attachment will be conclusive as between the parties until it is reversed on error,[2] or on appeal where an appeal is specially provided for.[3]

Where there are several defendants, as in the case of a co-partnership, and an attachment has been issued against all and levied upon all the (partnership) property and but one defendant pleads in abatement, the judgment, upon a finding in his favor, should be the abatement of the attachment as to the defendant who pleaded therein.[4]

The effect of a dissolution of the attachment is that in all cases where there has been personal service upon the defendant or a voluntary general appearance by him, the action will proceed as though it had been an ordinary common law action commenced by a writ of summons or its equivalent; that is to say where the attachment is not necessary to give the court jurisdiction of the cause, the dissolution of the attachment defeats that particular writ and does not touch the merits of the action or dismiss the cause. They are independent proceedings.[5] But where the attachment is not a mere incident to the

1. Wright *v.* Rambo, 21 Gratt. (Va.) 158; Evans *v.* Saul, 8 Martin, N. S. (La.) 247.

As to the recovery of damages from the plaintiff after dissolution of attachment because of having wrongfully or maliciously caused the same to issue, see *post*, § 370, "Liability of the Plaintiff," and *ante*, § 182, "Action on the Bond."

2. Strauss *v.* Cooch, 47 Ohio 115, 24 N. E. Rep. 1071; Hoge *v.* Norton, 22 Kan. 374; Swezey *v.* Bartlett, 3 Abb. (N. Y.) Pr. n. s. 444; Dunn *v.* Myers, 3 Yerger (Tenn.) 413.

3. Danforth *v.* Rupert, 11 Iowa 547; Ryan *v.* Heenan, 76 Iowa 589, 41 N. W. Rep. 367; McCormick, etc., Co. *v.* Jacobson, 77 Iowa 582, 42 N. W. Rep. 499.

4. Hill *v.* Bell, 111 Mo. Sup. 35, 19 S. W. Rep. 959.

As to such a dissolution in Kansas, see Stone *v.* Boone, 24 Kan. 337.

5. Boggs *v.* Bindskoff, 23 Ill. 65; Focke *v.* Hardeman, 67 Tex. 173, 2 S. W. Rep. 363; Lewenthall *v.* Mississippi Mills, 55 Miss. 101; Camp *v.* Cahn, 53 Ga. 558; Phillips *v.* Hines, 33 Miss. 163; Reynolds *v.* Jordan, 19 Ga. 436; Schoppenhast *v.* Bollman, 21 Ind. 280; Paul *v.* Ward, 21 Ind. 211; Excelsior Fork Co. *v.* Lukens, 38 Ind. 438; Bates *v.* Crow, 57 Miss. 676; Malone *v.* Lindley, 1 Phila. 192 (288); Bayersdorfer *v.* Hart, 13 Phila. 192;

main action, and is the foundation of the suit and necessary to the jurisdiction of the court, an order setting aside the attachment will terminate the action unless the proceeding is taken up for review.[1] Certainly no illegal attachment can stand as a summons.[2] Where also a statute permits an attachment to issue upon a debt not due, a dissolution of the attachment proceedings will be a termination thereof, because in no proceeding but by attachment can an action be maintained before the demand has matured.[3]

The dissolution of the attachment dissolves the attachment lien and discharges the property from the effect thereof.[4] It then becomes the duty of the officer to turn over the property to the true owner who is *prima facie* defendant in the attachment.[5] Unless particularly required by the statute it is not necessary that the court order the property to be delivered up

Bundrem *v.* Denn, 25 Kan. 430; Stapleton *v.* Orr, 43 Kan. 170, 23 Pac. Rep. 109; Hills *v.* Moore, 40 Mich. 210; Hill *v.* Harding, 93 Ill. 77; Schulenberg *v.* Farwell, 84 Ill. 400; Light *v.* Isear, 28 S. C. 440, 6 S. E. Rep. 284; Ouzst *v.* Seabrook, 47 Ga. 359; *ante*, § 4.

1. Watson *v.* Simpson, 15 La. Ann. 709; Morrison *v.* Ream, 1 Pinney (Wis.) 244; *ante*, §§ 5 and 216.

2. Kennedy *v.* Chumar, 26 N. J. L., 2 Dutch. 305.

3. Voorhis *v.* Michaelis, 45 Kan. 255, 25 Pac. Rep. 592; Gowen *v.* Hanson, 55 Wis. 341; Moore *v.* Corley, (Tex.) 16 S. W. Rep. 787; Wingo *v.* Purdy, 87 Va. 472, 12 S. E. Rep. 970.

4. Harrison *v.* Trader, 29 Ark. 85; Currens *v.* Ratcliffe, 9 Iowa 309; Harrow *v.* Lyon, 3 G. Green (Iowa) 157.

5. Jackman *v.* Anderson, 33 Ark. 414; McReady *v.* Rogers, 1 Neb. 124; Felker *v.* Emerson, 17 Vt. 101; Gass *v.* Williams, 46 Ind. 253; State *v.* Fitzpatrick, 64 Mo. 185; Ryan Drug Co. *v.* Peacock, 40 Minn. 470, 42 N. W. Rep. 289; Hamilton *v.* Kilpatrick, (Tex. Civ. App.) 29 S. W. Rep. 819.

Where the defendant has sold the property during the pendency of the action and has notified the officer of that fact, it is his duty, on dissolution of the attachment, to deliver the property to the vendee. State *v.* Fitzpatrick, 64 Mo. 185.

It is no part of the officer's duty to retain the property to enable the plaintiff to appeal from the order dissolving it and to give a stay-bond. Ryan Drug Co. *v.* Peacock, 40 Minn. 470, 42 N. W. Rep. 298.

The officer has a right to be reimbursed by the defendant for all necessary expenses he has incurred in getting possession and in keeping the property. McReady *v.* Rogers, 1 Neb. 124; *ante*, §§ 263 and 285.

But that the officer has no further lien upon the property therefor after the dissolution of the attachment, see Felker *v.* Emerson, 17 Vt. 101.

When an attachment is dissolved, or what is the same thing, when a writ is quashed, the bond given for the redelivery of the attached property being

to the defendant. But when the statute so requires it is imperative that such an order be entered.[1] But no order of court is required to give effect to the dissolution of attachment on land.[2]

When the dissolution of an attachment is sought upon property which may be separated, and it is found that it should be dismissed for illegality as to a part, that much of the property may be discharged and the attachment may stand for so much as it could properly issue for.[3]

Where a plaintiff sued out two attachments against the same defendant on the same grounds and the defendant asked a dissolution of "the attachment" for the reason that the alleged grounds did not exist, and both the parties treated the request as being addressed to both writs, the court properly dissolved both attachments.[4]

Where a court dissolves an attachment *on a motion* made before the final hearing of the case, such refusal is not final in a sense that will preclude the same court from discharging it at the final hearing.[5] And the denial of a motion to dissolve an attachment, when such motion is based upon one ground for dissolution, is no bar to a second motion to vacate the attachment based upon another ground for dissolution, although the party might have urged the latter ground on his former motion.[6]

Where, however, an attachment has been vacated by the court, after opposition and argument on the merits of the application, an order vacating it is final in a sense that another

based upon the writ, necessarily falls with the writ. Gass *v.* Williams, 46 Ind. 253.

1. Evans *v.* Virgin, 72 Wis. 423, 39 N. W. Rep. 864.

Under a statute prescribing that an order be entered that the attached property be delivered up to the "defendant," an order directing that the property be delivered to the defendant's assignee for the benefit of creditors will not stand. Morawitz *v.* Wolf, 70 Wis. 515, 36 N. W. Rep. 392.

2. Smith *v.* Robinson, 64 Cal. 387.

3. Moses *v.* Arnold, 43 Iowa 187; Gross *v.* Goldsmith, 4 Mackey (D. C.) 126.

4. Wearne *v.* France, 3 Wyo. 273; 21 Pac. Rep. 703.

5. Talbot *v.* Pierce, 14 B. Mon. (Ky.) 195.

6. Steuben County Bank *v.* Alberger, 83 N. Y. 274, s. c. 61 How. (N. Y.) Pr. 227.

attachment between the same parties on substantially the same facts will not be allowed whether the application be made to the same court or to another court.[1]

§ 355. Review of order dissolving attachment—Effect of reversal.—An attachment plaintiff, who desires to have a superior court review proceedings dissolving an attachment, should take steps in that direction immediately or get an order from the court to stay the dissolution for a time sufficient to enable him to perfect his removal, by error or appeal to such superior court, in a manner that will operate as a *supersedeas*, for while such a *supersedeas* will continue the attachment lien[2] yet in a state where the officer may properly surrender the property to the defendant upon dissolution without an order of court directing him so to do, the officer can not be held liable for a surrender of the property in the interval.[3] And the plaintiff's lien upon the attached property will be lost.[4]

In states where the order discharging the attachment is considered to be a final order, it may be reviewed on error,[5] where the affidavits read or the evidence heard on an application to dissolve an attachment has been excepted to and is incorporated in the bill of exceptions.[6] But since the evidence submitted to the court in proceedings to dissolve the attachment is no part of the record (unless specifically made so by statute),[7] the dissolution of it can not be taken up on a writ of

1. Schlemmer *v.* Myerstein, 19 How. (N. Y.) Pr. 412.

2. *Ante*, § 354.

3. Danforth *v.* Rupert, 11 Iowa 547; Sherrod *v.* Davis, 17 Ala. 312.

The same principle applies to the clerk of the court in possession of the fund realized on the sale of the attached property, when he has no notice of the appeal. Danforth *v.* Rupert, 11 Iowa 547.

4. Danforth *v.* Carter, 4 Iowa 230.

5. Adams County Bank *v.* Morgan, 26 Neb. 148, 41 N. W. Rep. 993; Dickinson *v.* Barnes, 3 Gill. (Md.) 485; Dawson *v.* Miller, 20 Tex. 171; Messner *v.* Lewis, 20 Tex. 221.

Before the plea to the merits is filed. Schlatter *v.* Hunt, 1 Mo. 651. Where right disputed evidence must clearly preponderate. Loranger *v.* Big M. M. Co., (S. D.) 61 N. W. Rep. 686; Finance Co. of Penn. *v.* Hursey, (Minn.) 61 N. W. Rep. 672; Kirby *v.* Colwell, (N. Y.) 30 N. Y. S. 880.

6. Bowring *v.* Bowring, 4 Utah 185, 7 Pac. Rep. 716.

The affidavits of themselves are no part of the record. Brown *v.* Ridgway, 10 Pa. St. 42; *Ex parte* Putnam, 20 Ala. 592; Watson *v.* Auerbach, 57 Ala. 353. And the court can not review the proceedings on error although the facts may be stated by consent in the record. Anon., 1 Binn. (Pa.)226.

7. In Iowa by force of the code motions to dissolve attachments become part of the record and an order dis-

certiorari to review the facts.[1] And for the same reason an appeal from the final judgment in the main action will not cause the upper court to review an order dissolving an attachment,[2] unless an appeal is specially provided for by the statute.

Many states which long considered an order vacating an attachment as a discretionary order and therefore not reviewable have by special statutes provided for an appeal in such cases. These statutory provisions have no proper place in a work of general character like this and are therefore omitted.[3] When such an appeal is not taken within the time provided therefor, the lien is necessarily lost and the property must be returned.[4] It seems that it will also be lost by a judgment upon the merits and an order for the return of the property to the defendant, made within the time provided for the appeal from the former dissolution proceedings.[5]

On review of an order sustaining an attachment which it has been sought to dissolve, and where the grounds of the motion do not appear, and the attachment is good on its face, it will be presumed that the decision of the lower court was well rendered, in the absence of proof to the contrary.[6]

solving an attachment may be assigned for error without incorporating the motion into the bill of exceptions. Ellsworth *v.* Moore, 5 Iowa 486.

1. Holland *v.* White, 120 Pa. St. 228, 13 Atl. Rep. 782; Brown *v.* Blanchard, 39 Mich. 790; State Bank of Fenton *v.* Whittle, 41 Mich. 365; Linn *v.* Roberts, 15 Mich. 443; Hyde *v.* Nelson, 11 Mich. 353.

2. Allender *v.* Fritts, 24 Cal. 447; Brown *v.* Hawkins, 68 N. C. 444.

3. A statute permitting appeal from a court commissioner to the court of which he is such commissioner, will not permit an appeal to that court from the decision of a *judge* of that court. Harvey *v.* Judge St. Joseph Circuit Court, 30 N. W. Rep. 188; Harvey *v.* Pealer, 63 Mich. 572.

Under a statute permitting an appeal in New York, the rule is that an order *sustaining* an attachment will be affirmed unless there is an entire absence of some fact necessary to authorize the attachment, but the rule does not apply to an appeal from an order *refusing* to vacate the attachment. Brewster *v.* Van Camp, 62 N. Y. Supr. 603, 8 N. Y. Supp. 588; Bicknell *v.* Speir, (Com. Pl. N. Y.) 18 N. Y. Supp. 590.

4. And no order of court for such return is necessary unless specifically made so by statute. Ryan *v.* Heenan, 76 Ia. 589, 41 N. W. Rep. 367; McCormick, etc., Co. *v.* Jacobson, 77 Iowa 582, 42 N. W. Rep. 499.

5. Becker *v.* Steele, 41 Kan. 173, 21 Pac. Rep. 169.

6. Cobb *v.* O'Neal, 1 How. (Miss.) 581.

A reversal of the order dissolving an attachment of course continues the lien upon the attached property in the same manner as though no proceedings had been taken to procure a discharge of it.[1]

§ 356. **Amendment pending proceedings to dissolve an attachment.**—When the attachment proceedings are not *void* on their face and only show *irregularities* therein they will not be summarily dismissed on application, but the plaintiff will be permitted to cure the defect by amendment. It is only when they are alleged to show an absolute nullity that an amendment will be denied.[2] When some act or allegation has been omitted which was necessary to give the court jurisdiction in the attachment, the court is without power to allow an effective amendment.[3] And if it does permit an amendment it will not create a lien or affect the rights of *bona fide* purchasers.[4] Where also the proceedings are *adjudged* to be *insufficient* on a plea in abatement, the attachment will not be dissolved, in states permitting amendments, until the plaintiff has been given a reasonable opportunity to supply the insufficiency.[5]

When an amendment is sought to be made a new ground for attachment can not be added, but a new statement of the same cause of action, *i. e.*, a new count, may be included,[6] and he may state new facts constituting the same ground for attachment.[7] A new party may not be substituted for an original one,[8] but it is allowable to amend by making one who is a member of the plaintiff firm a party.[9]

1. Jaffray *v.* H. B. Claflin Co., 119 Mo. 117, 24 S. W. Rep. 761; also, *ante* § 324.

2. Hathaway *v.* Davis, 33 Cal. 161; Branch *v.* Frank, 81 N. C. 180; Graves *v.* Cole, 1 Greene (Ia.) 405; Chattahoochee Brick Co. *v.* Sullivan, 86 Ga. 50, 12 S. E. Rep. 216.

3. Buhl *v.* Ball, 41 Hun (N. Y.) 61; Baltimore Bank *v.* Teal, 4 Hughes C. Ct. 572.

4. Whitney *v.* Brunett, 15 Wis. 61.

5. Claflin *v.* Hoover, 20 Mo. App. 314.

6. Mendes *v.* Freiters, 16 Nev. 388; Ball *v.* Claflin, 5 Pick. (Mass.) 303.

7. Kibbe *v.* Wetmore, 31 Hun (N. Y.) 424.

8. Milledgeville Mfg. Co. *v.* Rives, 44 Ga. 479; *ante*, §§ 152 and 197.

9. Henderson *v.* Stetter, 31 Kan. 56.

Amendments are sometimes directed to be made "under the direction of the court."[1] And it is suggested that a party who desires to amend some part of his pleadings in attachment should prepare his amendment and submit it to the inspection of the court.[2]

1. Tarkington *v.* Broussard, 51 Tex. 550.

2. McFarland *v.* Claypool, 128 Ill. 397. Further as to "Amendment of Affidavit," see *ante*, § 152; "Amendment of Bond," *ante*, § 179; "Amendment of Writ," *ante*, § 197; "Amendment of Service," *ante*, § 222; "Amendment of Return," *ante*, § 238.

CHAPTER XVI.

LIABILITY OF PLAINTIFF BEYOND THE COVENANTS OF THE BOND.

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Part I. Liability for Mere Wrongful Attachment—Actual Damages.

§ 357. **Plaintiff's liability, generally.**—The plaintiff in attachment is liable to the attachment defendant for a breach of covenant in the bond for attachment. This is an action on the contract and can be maintained by no one else than the attachment defendant. The plaintiff is liable to such action against him alone or against him and his sureties on the bond. The recovery in such action is limited to the amount nominated in the bond. This liability has been particularly indicated hereinbefore.[1] The attachment bond is designed to preserve the *debtor* harmless from a wrongful suing out of the attachment process. But the plaintiff in attachment may incur a further liability than to an action on the bond. He may become a wrong-doer and a trespasser and may render himself liable to an action *ex delicto*. As a wrong-doer or trespasser, he is not only liable to the attachment defendant, but to any person whose rights are injured by the attachment. And he will not only be liable to the attachment defendant for the actual damage to the amount named in the bond, but in whatever amount the actual damage is ascertained to be. Furthermore, he will not only be held liable to repair the actual injury, but where he has sued out the writ with "malice," and without "probable cause," he may be held to punitive or "exemplary" damages also. The attachment plaintiff will be so liable in an action against himself alone; or, when his wrongful act is participated in by another trespasser or trespassers, he will be liable jointly with him or them.

§ 358. **Plaintiff liable as a wrong-doer to other action than on the bond.**—In a few states it is held that the attachment defendant can only recover for the suing out of a wrongful attachment by an action on the bond, unless the attachment has

1. See *ante*, § 182.

been maliciously sued out, in which event alone an action on the case can be sustained, and exemplary damages recovered.[1] In many other states it is not the rule that an action to recover *actual* damages for suing out a wrongful attachment must be based on the attachment bond. The liability of the sureties is limited to the bond; but, as against the attachment plaintiff, *actual* damages may be recovered in the action in which the attachment writ was sued out, either by counter-claim or plea in reconvention,[2] or an inquiry of damages;[3] or by a separate and independent action.[4] But in no case can *exemplary* damages be recovered unless malice or abuse of process is shown.[5]

The attachment plaintiff is, in any event, liable at common law to one whose property has been attached on a writ issuing against another, for that is taking property without due process of law and is manifestly wrongful.

§ 359. **Plaintiff liable as a tort-feasor when no grounds for attachment exist.**—It is maintained that a man ought not to take out legal process to seize the property of another without some knowledge on the subject, and that he is responsible for the consequences if he does so in utter recklessness and ignorance.[6] A man is entitled to an attachment only when certain facts exist, and not when there is probable cause to believe they exist. If they do not exist, issuance of a writ of attach-

1. City Nat. Bank *v.* Jeffries, 73 Ala. 183; McKellar *v.* Couch, 34 Ala. 336; Frantz *v.* Hanford, 87 Iowa 469, 54 N. W. Rep. 474; Tallant *v.* Burlington Gas Light Co., 36 Iowa 262; Veiths *v.* Hagge, 8 Iowa 163; Abbott *v.* Whipple, 4 Greene (Iowa) 320; Union Mercantile Co. *v.* Chandler, (Iowa) 57 N. W. Rep. 595.

2. Half *v.* Curtis, 68 Tex. 640, 5 S. W. Rep. 451; Walcott *v.* Hendrick, 6 Tex. 406; Peiser *v.* Cushman, 13 Tex. 390.

3. Betancourt *v.* Maduel, 69 Miss. 839, 11 So. Rep. 111; Ashland County Supervisors *v.* Stahl, 48 Wis. 593; Smith *v.* Story, 4 Humph. (Tenn.) 169.

4. Half *v.* Curtis, 68 Tex. 640, 5 S. W. Rep. 451; Renkert *v.* Elliott, 11 Lea (Tenn.) 235; McDaniel *v.* Gardner, 34 La. Ann. 341.

5. McDaniel *v.* Gardner, 34 La. Ann. 341. As to "Malicious Attachment," see *post*, § 370, *et seq.*

6. Wills *v.* Noyes, 12 Pick (Mass.) 324.

ment will be wrongful, and the plaintiff who sues it out will be liable in tort, after dissolution, for all damages sustained.[1]

§ 360. **Plaintiff liable in tort though there be grounds for attachment.**—When the *levy* of an attachment is unlawful, damages may be recovered in an action sounding in tort, even though there may have been grounds for the attachment and although the suing out of the writ be not accompanied by malice.[2] Suing out an attachment before a right of action is matured and unnecessarily levying upon property of greater value than that required to satisfy the demand is wrongful.[3] And so is a false statement of the ground for attachment.[4] A levy made under a writ that issued without compliance with the statutory requirements, or under any other writ void for want of jurisdiction, is tortious,[5] as well as a levy accomplished by forceful acts. In like manner where there is a failure to do

1. McLaughlin *v.* Davis, 14 Kan. 168; Mitchell *v.* Mattingly, 1 Metc. (Ky.) 237; Kirksey *v.* Jones, 7 Ala. 622; Seay *v.* Greenwood, 21 Ala. 491; Foster *v.* Sweeny, 14 Serg. & R. (Pa.) 386; Sanders *v.* Hughes, 2 Brev. (S. C.) 495; Smith *v.* Story, 4 Humph. (Tenn.) 169; Hollingsworth *v.* Atkins, 46 La. Ann. 515, 15 So. Rep. 77; Stienhardt *v.* Leman, 41 La. Ann. 835, 6 So. Rep. 665; Harger *v.* Spofford, 46 Iowa 11; Connelly *v.* Woods, 31 Kan. 359.

If a personal representative (an administrator) wrongfully sue out an attachment he will be *personally* liable for the damages sustained by the defendant. Gilmer *v.* Wier, 8 Ala. 72; Kirksey *v.* Jones, 7 Ala. 622; Fry *v.* Estes, 52 Mo. App. 1.

2. McNeil *v.* Moore, (Tex. Civ. App.) 27 S. W. Rep. 163; Fry *v.* Estes, 51 Mo. App. 1; McDaniel *v.* Gardner, 34 La. Ann. 341.

3. Watson *v.* Kennedy, 8 La. Ann. 280.

4. Stiff *v.* Fisher, 85 Tex. 556, 22 S. W. Rep. 577.

In this case an attachment was sued out on the ground that a large sum of money, which was sought to be recovered, was obtained by false pretenses, when, in fact, only a small part of such sum was so obtained. Stiff *v.* Fisher, (Tex. Sup.) 22 S. W. Rep. 577.

5. Kelly *v.* Archer, 48 Barb. (N. Y.) 68.

A creditor who attaches goods of his debtor upon a writ issued by court for the collection of a claim greater than that over which such court has jurisdiction, he becomes a trespasser *ab initio*. In New Jersey a justice's jurisdiction is limited to demands of one hundred dollars. Therefore the suing out of a writ to collect two hundred dollars was a trespass on the part of the creditor. McFadden *v.* Whitney, 51 N. J. L. 391, 18 Atl. Rep. 62.

In such case the fact that the goods were thereafter returned to the debtor must be considered in mitigation of damages. McFadden *v.* Whitney, 51 N. J. L. 391, 18 Atl. Rep. 62.

some act in perfecting the levy which is necessary to the acquirement of jurisdiction, its omission will cause the attachment to be unauthorized and void from the beginning, and may cause every act done under it to be a trespass for which damages may be recovered.[1] The mere failure to succeed in the prosecution of an attachment *per se* does not put the plaintiff in the wrong.[2] But when an attachment lien is dissolved, the attachment creditor, by still holding or refusing to surrender the goods, becomes a trespasser *ab initio*.[3] The attachment and removal of exempt personal property is of course wrongful; but the levy of an attachment upon the homestead of the defendant can not be the foundation of an action for damages, for since the levy is a nullity, it neither disturbs his possession nor affects his rights.[4] A fraudulent attachment

1. Ruser *v.* Union Distilling Co., (Com. Pl. N. Y.) 27 N. Y. S. 920, 7 Misc. Rep. 396, affirming 24 N. Y. S. 101.

In this case summons was not served on the defendant in the action within the time required by the code. The court wholly lost jurisdiction. Ruser *v.* Union Distilling Co., (Com. Pl. N. Y.) 27 N. Y. S. 920, 7 Misc. Rep. 396, affirming 24 N. Y. S. 101.

2. Smith *v.* Story, 4 Humph. (Tenn.) 169.

3. Wehle *v.* Butler, 35 N. Y. Super. Ct. 1.

If a partnership stock has been attached on a claim against an individual partner and the store occupied by a keeper, and the lease thereafter terminates, and the firm is dissolved by the retirement of the individual sued, and the continuing partner takes a new lease to the store he may recover against the keeper for a continued occupation of it. Trafford *v.* Hubbard, 15 R. I. 326, 8 Atl. Rep. 690.

4. Traweek *v.* Martin-Brown Co., 79 Tex. 460, 14 S. W. Rep. 564.

The procurement of a debtor residing in one state, to remove property exempt in that state into another state where it is liable to attachment, and there attaching it, is wrongful and renders the creditor liable in damages. Deyo *v.* Jennison, 10 Allen (Mass.) 410.

However, a resident of Indiana sued out an attachment before a justice of the peace in Illinois against another resident of Indiana who was then temporarily in Illinois with property, which, by the law of Indiana, was exempt from attachment. The property was taken under the writ. It appeared on the trial that both parties lived in the same county in Indiana, and that the defendant could easily have been found there by the plaintiff. It also appeared that the debt was a just one and past due. There was nothing in these facts to make the plaintiff guilty of an abuse of process or to indicate that he sought the process in the Illinois court for an unlawful or fraudulent purpose. Mitchell *v.* Shook, 72 Ill. 492.

may not only render the creditor liable to the defendant, but by causing litigation and delay may render him liable in damages to a junior attachment creditor to the extent of the latter's losses from interest accruing on a senior attaching creditor's demand.[1] In all such cases the person whose rights are injured may have an action against the attachment plaintiff and need not join the officer with him as defendant.[2]

Actions for torts being, at common law, local actions, it becomes important to know where the tortious act was committed. In Texas this question is decided by a statute which provides that an action for trespass may be prosecuted within the county in which the cause of action accrued; and under it an action for the wrongful seizure of property under a writ of attachment may be brought in the county where the seizure took place, though none of the creditors procuring the attachment are residents in such county.[3]

One who has procured the wrongful issuance of a writ can not by assignment avoid his liability for damages thereafter occasioned by wrongful acts done by the assignee under the writ, although not in fact done with the privity of the assignor.[4]

1. Zadick *v.* Schafer, 77 Tex. 501, 14 S. W. Rep. 153.

2. Dyett *v.* Hyman, 129 N. Y. 351, 29 N. E. Rep. 261.

Party Injured May Be Estopped from Suing.—The ordinary rules of estoppel obtain in cases where the injured party has consented to, or ratified the acts, or has not asserted his rights in apt time. When, however, one person's property is attached as belonging to another and is sold by order of court as perishable, the acceptance of the proceeds by the owner will not prevent his recovering for the damages sustained by the attachment. Franke *v.* Ely, 50 Mo. App. 579. Nor will one whose property has been wrongfully attached be prevented from suing therefor by the fact that it was mortgaged at the time of the levy, together with the fact that he subsequently sold his interest to the mortgagee, where the latter sets up no claim. This is because the rights of the parties are fixed at the date of the levy. Loomis *v.* Stuart, (Tex. Civ. App.) 24 S. W. Rep. 1078. Nor will the owner's presence at the sale of property wrongfully attached and his assistance (without objection thereto) in making a better sale prejudice him in an action for the damages sustained by the attachment. First Nat. Bank *v.* Houts, 85 Tex. 69, 19 S. W. Rep. 1080.

3. Willis *v.* McNatt, 75 Tex. 69, 12 S. W. Rep. 478; Perry *v.* Stephens, 77 Tex. 246, 13 S. W. Rep. 984.

4. Hodges *v.* Biggs, 2 A. K. Marshall (Ky.) 220.

Suing out an attachment before a right of action is matured and unnecessarily levying upon property of greater value than that required to satisfy the demand is wrongful.[1] And so is a false statement of the ground for attachment.[2]

§ 361. **Liable in what form of action.**—When no force is used in committing the wrong, the proper form of action, at common law, is, "trespass on the case,"[3] but where the force is used—as for example in carrying away goods not belonging to the attachment defendant—"trespass *vi et armis*" may be maintained.[4]

When the goods of one person are taken on a writ running against another, it is taking without process and constitutes a conversion for which "trover" is a concurrent remedy, with "trespass" at suit by the owner.[5]

It is a well settled principle of law that he who, whether an officer of the law or otherwise, takes the property of another without authority, is a wrong-doer, and that the *property* may be recovered in a proper action.[6] When the officer levies an attachment upon the goods of a person other than the attachment defendant, the plaintiff in attachment will not be liable to an action of replevin when he did not direct the sheriff to seize the goods;[7] but where the attachment plaintiff instructs the officer to make such a levy, he as well as the sheriff is

1. Watson *v.* Kenedy, 8 La. Ann. 280.

2. Stiff *v.* Fisher, 85 Tex. 556, 22 S. W. Rep. 577.

In this case an attachment was sued out on the ground that a large sum of money, which was sought to be recovered, was obtained by false pretenses, when, in fact, only a small part of such sum was so obtained. Stiff *v.* Fisher, 85 Tex. 556, 22 S. W. Rep. 577.

3. Adams *v.* Paige, 7 Pick. (Mass.) 542.

4. Smith *v.* Kaufman, 94 Ala. 364, 10 So. Rep. 229; Fechheimer *v.* Nat. Exch. Bank, 31 Gratt. (Va.) 651.

5. Meade *v.* Smith, 16 Conn. 346; Rough *v.* Womer, 76 Mich. 375; Woodbury *v.* Long, 8 Pick. (Mass.) 543.

And no demand need be made before bringing suit. Woodbury *v.* Long, 8 Pick. (Mass.) 543.

Trover can not be brought against one who has attached but has not taken possession. Bailey *v.* Adams, 14 Wend. (N. Y.) 202.

6. Caldwell *v.* Arnold, 8 Minn. 265.

7. Richardson *v.* Reed, 4 Gray (Mass.) 441.

liable to an action of replevin; or to an action of that nature.[1] If the record in an action which has been brought to recover attached goods shows that an indemnifying bond was given to the sheriff to protect him in making the levy complained of, it will be presumed that such bond was given at the instance of the attaching creditor, and that he was a party to the trespass; therefore he will be held liable for the damages that have been occasioned by it.[2]

§ 362. **Liable for trespass of officer, when.**—When a valid writ is placed in the hands of an officer by an attachment plaintiff, and he makes no specific directions concerning the property to be levied upon, he is not liable for the acts committed or omitted by the officer making the seizure.[3] When the writ, however, is irregular, unauthorized and void, the officer is not clothed with any authority of law whatever. He is merely the agent of the plaintiff, who becomes liable for all acts of the officer in making a levy.[4] And although the writ be valid, it only clothes the officer with authority to seize the property of the person against whom it is issued and in a lawful manner.[5] Therefore, if the attachment plaintiff directs the sheriff to do illegal acts in making a levy, or to seize exempt property, or to seize the goods of another person than the defendant in attachment, the plaintiff, by such direction, becomes a trespasser, on the principle that all who procure a trespass to be done are themselves trespassers, and on the sup-

1. Marsh *v.* Backus, 16 Barb. (N. Y.) 483; Allen *v.* Crary, 10 Wend. (N. Y.) 349; Acker *v.* Campbell, 23 Wend. (N. Y.) 372.

2. Pool *v.* Ellison, 9 N. Y. S. 171, 56 Hun (N. Y.)108.

3. Michels *v.* Stork, 44 Mich. 2; Butler *v.* Borders, 6 Blackf. (Ind.) 160; Corner *v.* Mackintosh, 48 Md. 374.

If an attachment is brought against an individual member of a partnership and a levy is made upon specific chattels owned by the partnership itself, instead of upon the defendant's individual interest, such seizure will be a trespass, and a partner may maintain a joint action with his copartners and recover damages for injury to the attached property or for injury to the business. Haynes *v.* Knowles, 36 Mich. 407.

4. Hall *v.* Waterbury, 5 Abb. (N. Y.) n. c. 374; Munn *v.* Commission Co., 15 Johns. (N. Y.) 44; Dyett *v.* Hyman, 129 N. Y. 351, 29 N. E. Rep. 261; Stetson *v.* Goldsmith, 30 Ala. 602, 31 Ala. 649.

5. Ford *v.* Dyer, 26 Miss. 243.

position that the officer did not take the goods under the pretended authority of the writ, but as the servant of the creditor.[1]

Furthermore, the attachment plaintiff may become liable for the trespass of the attaching officer without having directed the levy or aided therein. If he knowingly consent to the very act which constitutes the wrong,[2] or if he receive the benefits arising from the levy and sale, he is liable for the trespass to the same extent as if the act had been authorized by him.[3] Defending an interpleader filed by an owner of goods attached on a writ against another, will be evidence of the attaching creditor's assent to the seizure by the officer and will render such creditor liable in trespass.[4]

The writ being void on its face, the fact that the goods levied upon were owned by the person against whom it was intended to proceed by attachment does not excuse the trespass of either the plaintiff or the officer who seized the property.[5]

An action against the attachment plaintiff, for the acts of the attaching officer, is not barred by a judgment against the officer for the same cause, so long as such judgment remains unsatisfied.[6]

1. Corner *v.* Mackintosh, 48 Md. 374; Lamb *v.* Day, 8 Vt. 407; Perrin *v.* Claflin, 11 Mo. 13; Wehle *v.* Butler, 61 N. Y. 245; Chapin *v.* Fitzgerald, 5 N. Y. S. 722.

The giving of an indemnity bond to the sheriff in order to protect him in making the seizure is considered as a direction to make the levy and renders the attachment plaintiff liable for a wrongful levy. McConnell *v.* Langdon, 2 Idaho 893, 28 Pac. Rep. 403; Dyett *v.* Hyman, 129 N. Y. 351, 29 N. E. Rep. 261.

Even though the bond be not signed by him, it will be presumed to have been given at his request. Pool *v.* Ellison, 9 N. Y. S. 171, 56 Hun (N. Y.) 108.

Where several creditors procure illegal levies of attachments to be made, they all become alike trespassers, liable to like actions, and the injured person may, at his option in New York, sue one or all. Wehle *v.* Butler, 61 N. Y. 254; Vose *v.* Woods, 26 Hun (N. Y.) 486.

And he may recover the entire damage in a suit against one. Dyett *v.* Hyman, 129 N. Y. 351, 29 N. E. Rep. 261.

2. Evarts *v.* Hyde, 51 Vt. 183.

3. Norman *v.* Horn, 36 Mo. App. 419; Murray *v.* Binninger, 3 Abbott's Ct. App. Dec. 336.

4. Perrin *v.* Claflin, 11 Mo. 13. See further as to Ratification, *post*, § 364, "Liable Jointly with Officer," § 365.

5. Patrick *v.* Solinger, 9 Daly (N. Y.)149.

6. Knight *v.* Nelson, 117 Mass. 458.

§ 363. **Liable for acts of his attorney.**—When a creditor instructs an attorney with a claim for collection by suit, the wrongful suing out of an attachment will render the creditor liable for the actual damages sustained.[1] Especially where the affidavit or petition was sworn to by the creditor.[2] And when the attorney is present when the levy is made and does not forbid it, it is said, the levy should be treated as having been directed by the attorney with authority from his client.[3]

§ 364. **Liable jointly with attaching officer.**—Following the common law rule that wrong-doers are liable in actions for torts either jointly or severally, a creditor who procures an attachment writ and directs a wrongful levy and sale of another's property, becomes not only liable in an action against himself alone,[4] but the injured party may bring the action against him and the attaching officer jointly.[5]

The principle of ratification also applies. A ratification of the acts of the officer may be express or implied. If exempt property is attached and sold, the plaintiff buying it with knowledge of its exempt character ratifies the original taking and becomes jointly liable with the sheriff.[6] And if an action be brought against the attaching creditor and the sheriff jointly, for a wrongful attachment, and the creditor plead or answer, such plea or answer will be treated as an adoption of the levy of the officer, and will render the creditor jointly liable with the officer.[7]

§ 365. **Liable jointly with other creditors.**—Where various creditors wrongfully seize, under attachment, the property of

1. Kirksey *v.* Jones, 7 Ala. 622.

2. Meyer *v.* Gage, 65 Iowa 606.

3. Jones *v.* Lamon, 92 Ga. 529, 18 S. E. Rep. 423; Oestrich *v.* Gilbert, 9 Hun (16 N. Y.Supr. Ct.) 242.

4. As shown in § 357 above.

5. Walker *v.* Wonderlick, 33 Neb. 504, 50 N. W. Rep. 445; Blakely *v.* Smith, (Ky.) 26 S. W. Rep. 584; B. C. Evans Co. *v.* Reeves, 6 Tex. Civ. App. 254, 26 S. W. Rep. 219.

In the latter case, not only the attaching creditor and the sheriff, but also the sureties of the sheriff were properly joined. In Texas, by statute, the officer may ask that the indemnitors be made joint parties defendant. Stevens *v.* Wolf, 77 Tex. 215, 14 S. W. Rep. 29.

6. Murphy *v.* Sherman, 25 Minn. 196.

7. Taylor *v.* Ryan, 15 Neb. 573; see, also, as to ratification, *ante*, § 364.

a debtor, or levy upon the property of another than the debtor, they all become liable for the tortious acts in which they are all concerned, and it is at the option of the injured party to sue one or all of them.[1] And it has been said that in an action against one of such creditors the injured debtor may recover the entire damage, and that it is no defense that the others are also liable for the trespass.[2] To render all jointly liable, the trespass must have been participated in by them all, for the mere fact that the goods have been wrongfully attached by several different parties will not make them jointly liable for one trespass.[3] But where several writs of attachment were sued out by different creditors of the same debtor, at the same time and through the same attorney, and the writs came to the sheriff's hands within a few minutes of each other, and all were levied on the next day, and the suits were afterward consolidated and tried together, it was considered sufficient to warrant a finding that all the creditors were joint actors and guilty of conversion.[4]

§ 366. **When the cause of action accrues.**—While the rule governing actions brought by the defendant in attachment upon the attachment bond for wrongful attachment is, that such action can not be maintained until the attachment suit has been determined in favor of such attachment defendant,[5] and while actions for malicious attachments, being governed

1. Wehle *v.* Butler, 61 N. Y. 245; Vose *v.* Woods, 26 Hun (N. Y.) 486.

2. Dyett *v.* Hyman, 129 N. Y. 351, 29 N. E. Rep. 261; affirming 13 N. Y. S. 895.

3. Brewster *v.* Gauss, 37 Mo. 518.

4. Conrad *v.* Fisher, 37 Mo. App. 352.

The rule that the satisfaction of the judgment recovered in action against one of several trespassers bars an action against any and all the other trespassers, obtains here; and so does the rule of contribution. It has been held, however, that although the several attaching creditors were not properly joined as trespassers, they were, nevertheless, concluded by a judgment, which one of them paid, and that they were liable to the sum he had realized from his attachment, and not their share of the whole judgment. Brewster *v.* Gauss, 37 Mo. 518. See, also, Zadik *v.* Schafer, 77 Tex. 501, 14 S. W. Rep. 153.

5. See *ante*, § 182, "Action on the Bond."

by the rules applicable to an ordinary action for malicious prosecution, have been vacated,[1] yet in many cases it is said to be wholly unnecessary in order to maintain an action for the abuse of process of attachment that there should first be a termination of the attachment suit, because the issues in the two cases are wholly different from, and independent of, each other.[2] Where a writ of attachment is absolutely void there seems to be no necessity that it should be set aside before bringing an action for the injuries done under it, but if the process be merely irregular and voidable only, it would seem that the merits of the writ should be passed upon and the attachment disposed of by the court before an action is begun.[3] At all events, the cause of action is mature when the attachment proceedings have been dismissed. For the moment a wrongful attachment is set aside, the plaintiff becomes a trespasser *ab initio*, as though no process had been issued.[4] And the fact that the plaintiff is an actual creditor of the owner of the property attached under a void writ will in no manner tend to justify the trespass.[5]

Upon the question as to whether the attachment defendant, by consenting to,[6] or procured a dissolution of the attachment, becomes estopped from asserting its wrongful character, it is said in Minnesota that if the defendant voluntarily procure the

1. See *post*, § 370, "Malicious Attachment."

2. Rossiter *v.* Minnesota, etc., Paper Co., 37 Minn. 296, 33 N. W. Rep. 855; Tynberg *v.* Cohen, 76 Tex. 409, 13 S. W. Rep. 315; McLaughlin *v.* Davis, 14 Kan. 168; Zinn *v.* Rice, 154 Mass. 1, 27 N. E. Rep. 722; Cadwell *v.* Corey, 91 Mich. 335, 51 N. W. Rep. 888; Seay *v.* Greenwood, 21 Ala. 491; Shuff *v.* Morgan, 9 Martin (La.) 592. *Contra*, Sloan *v.* McCracken, 7 Lea (Tenn.) 626; Kramer *v.* Thompson-Houston Electric Light Co., 95 N. C. 277; Jackson *v.* Colcord, 114 Mass. 60.

3. *Re* Bradner, 87 N. Y. 171.

4. Lyon *v.* Yates, 52 Barb. (N. Y.) 237; Kerr *v.* Mount, 28 N. Y. 659.

5. Mississippi Mills *v.* Meyer, 83 Tex. Sup. 433, 18 S. W. Rep. 748.

As to whether he is only *prima facie* a trespasser, or whether the dissolution of the attachment is conclusive of its wrongfulness, see *post*, § 368.

6. If the first writ of attachment has been rendered invalid because of clerical inaccuracy and a second writ is sued out, evidence that the creditor consented to the bringing of the first attachment will warrant the question to be submitted to the jury whether he also consented to the suing out of the second. Baines *v.* Ullman, 71 Tex. 529, 9 S. W. Rep. 543.

release of the attachment by executing a bond in compliance with the statute to pay whatever judgment may be obtained against him, he can not thereafter maintain an action for wrongful attachment.[1] In Pennsylvania it is said that dissolving the attachment by the entry of special bail, and the confession of judgment for a smaller sum than that claimed, is not a waiver of the right of action.[2] But in Louisiana consenting to a dismissal of the attachment suit will not preclude the attachment defendant from claiming damages occasioned by wrongful seizure.[3]

In Texas an action for wrongfully suing out an attachment in another state has been maintained; but in such action the merits of the case were tested by the laws of the state where the attachment was obtained.[4]

§ 367. Pleading in action for mere wrongful attachment.— In courts where the action may be maintained for the recovery of actual damages before the termination of the attachment suit, it is wholly unnecessary to aver in the pleadings that the action in which the attachment was issued has terminated.[5] The declaration or complaint does not, however, state a cause of action when it merely avers that the attachment was unauthorized by law. It must state facts showing an unauthorized attachment.[6] In an action for the wrongful suing out of the attachment, the declaration must specifically deny the grounds on which the attachment was procured.[7]

1. Rachelman *v.* Skinner, 46 Minn. 196, 48 N. W. Rep. 776.

Further as to the effect of giving such bond see *ante*, § 304.

2. Foster *v.* Sweeney, 14 Serg. & R. (Pa.) 386.

3. Spalding *v.* Wallett, 10 La. Ann. 105.

4. Wiley *v.* Traiwick, 14 Tex. 662.

5. McLaughlin *v.* Davis, 14 Kan. 168.

6. Sprague *v.* Parsons, 13 Daly (N. Y.) 553.

Where there is no averment to show liability, an allegation that an attachment has been made of property largely in excess of the sum sued for, will not entitle the attachment defendant to recover from the plaintiff the damages thereby caused. O'Neil *v.* Wills Point Bank, 67 Tex. 36, 2 S. W. Rep. 754.

7. Tiller *v.* Shearer, 20 Ala. 527; Durr *v.* Jackson, 59 Ala. 203.

In an action by a senior attaching creditor against a junior attaching creditor, an allegation that the plaintiff "commenced a suit * * * and procured from the court a writ of at-

Wherever actions can be maintained for the recovery of actual damages for a mere wrongful attachment, there is no necessity to aver, in the declaration, malice or want of probable cause.[1]

The declaration must contain a specific description of the property that was wrongfully seized; but reasonable certainty is all that is required. In trespass for the wrongful attachment of a stock of goods, it will be sufficient if the declaration or complaint describe the property by giving the name, style and quantity of the different articles.[2] But describing the property as a "stock of goods consisting of salt, coal, oil, * * and various other kinds of goods usually kept by a retail grocer; also many articles of personal property necessary for use in connection with such business which were in the store, among other things a pair of platform scales and a stove,—all of said property being worth $600," will not be giving specific description of it with reasonable warranty.[3]

The declaration in an action for the recovery of damages sustained because of wrongful attachment, whether on the bond or sounding in tort, must allege that the damages claimed have not been paid, or such declaration will be demurrable.[4]

§ 368. **Proof in actions for the recovery of mere actual damages, occasioned by wrongful attachments.**—Actions for the recovery of actual damages occasioned by wrongful attach-

tachment in said cause" does not show a valid attachment; the court being of limited jurisdiction. He should aver facts showing that his cause for attachment came within the jurisdiction of that court. Harmon *v.* Comstock, etc., Co., 9 Mont. 243, 23 Pac. Rep. 470.

1. Sprague *v.* Parsons, 14 Abb. (N. Y.) N. C. 320. *Contra* when exemplary damages are sought. See "Malicious Attachment," *post* 370.

2. Harris *v.* Russell, 93 Ala. 59, 9 So. Rep. 541; Kennedy *v.* McKee, 12 Sup. Ct. Rep. 303, 142 U. S. 606.

3. Schneider *v.* Ferguson, 77 Tex. 572, 14 S. W. Rep. 154.

A specific description of property was excused by an allegation that the plaintiff was unable to give an accurate description of the attached property, although there was no statement that the return of the writ had been lost and that there was no description of the attached property to be found in the records of the suit. Schneider *v.* Ferguson, 77 Tex. 572, 14 S. W. Rep. 154.

4. Hencke *v.* Johnson, 62 Iowa 555.

ments are governed by the principles of the common law action for malicious prosecution so far as the same are applicable. The mere failure to succeed in the prosecution of an attachment does not, *per se*, put the attachment plaintiff in the wrong and render him liable at suit of the defendant.[1] It is said in Louisiana that where a judgment is simply one of nonsuit, the fact of the dissolution of the attachment is a finality and entitles the defendant to damages for wrongful attachment.[2] But in Texas the mere fact of an abandonment of an attachment does not even raise the presumption that it was wrongful; and the burden of proving it rests upon the party who brings an action for wrongful attachment.[3] And in Washington such dissolution is only *prima facie* evidence that it was rightfully dissolved, and does not preclude an investigation of that question in a subsequent action,[4] unless the order of dissolution was made after judicial investigation of the allegations in the affidavit.[5] In such event in Tennessee, also, the failure of a creditor to sustain an attachment suit conclusively entitles the defendant to his actual damages.[6] The proof regarding the grounds for attachment in these cases is governed by the rules controlling evidence in an action on the bond.[7] But when the action for the recovery of damages occasioned by the wrongful attachment is begun by one other than the attachment defendant, whose rights have been contravened, no evidence concerning the attachment case against the defendant is competent. The attaching creditor can only controvert the evidence of the acts alleged to be wrongful. The action is in the nature of an action for tort, governed by the rules in such cases, and the writ can not be introdueed by way of justification.[8]

1. Smith *v.* Story, 4 Humph. (Tenn.) 169. Compare Kennedy *v.* Meacham, 18 Fed. Rep. 312.

2. McDaniel *v.* Gardner, 34 La. Ann. 341.

3. Frank *v.* Tatum, (Tex. Civ. App.) 26 S. W. Rep. 900; Blum *v.* Strong, 71 Tex. 321, 6 S. W. Rep. 167.

4. Sloan *v.* Langert, 6 Wash. 26, 32 Pac. Rep. 1015.

5. Seattle Crockery Co. *v.* Haley, 6 Wash. 302, 33 Pac. 650.

6. Kennedy *v.* Meacham, 18 Fed. Rep. 312.

7. See *ante*, § 188.

8. As to justification in an action brought by the attachment defendant, see *ante*, § 204 and *post*, § 380.

§ 369. **Measure of damages in actions for mere wrongful attachments.**—The measure of damages recoverable because of wrongful attachment, when suit is brought by the attachment defendant, is substantially the same in an action *ex delicto*, when exemplary damages are not sought, as in an action *ex contractu*.[1] Where a stranger to the attachment writ seeks to recover damages because of a wrongful seizure, his recovery is governed by the same rules, so far as applicable. Nominal damages are recoverable when the levy was wrongful, without showing that it was accompanied by special damages.[2] Even in the attachment of land one will be entitled to nominal damages, although the evidence does not show that he has been disturbed in his possession, or is specially damaged by the levy.[3] The damages recoverable are only compensatory, and to recover the same the plaintiff in such an action must show affirmatively that such damages were the natural and probable consequence or legal result of the alleged wrongful act, and must show the extent of the injury sustained.[4] When goods that were not the property of the defendant have been attached and have not been returned, and an action has been brought against the attaching creditor, the measure of damages will be the value of the goods with legal interest thereon from the date of the seizure, together with the amount of the actual loss or damage occasioned to the owner by the attachment.[5] The measure of

1. See *ante*, § 182, "Action on the Bond."

2. Blynn *v.* Smith, 4 N. Y. S. 306.

3. Girard *v.* Moore, (Tex. Civ. App.) 24 S. W. Rep. 652. Compare Heathman *v.* Million, (Ky.) 31 S. W. Rep. 473.

4. Goodbar *v.* Lindsley, 51 Ark. 380, 11 S. W. Rep. 577; Estes *v.* Chesney, 54 Ark. 463, 16 S. W. Rep. 267; Brown *v.* Carroll, (R. I.) 18 Atl. Rep. 283; Pinson *v.* Kirsh, 46 Tex. 26; Tynberg *v.* Cohen, (Tex. Civ. App.) 24 S. W. Rep. 314; Brown *v.* Master, (Ala.) 16 So. Rep. 443; First Nat. Bank *v.* Hancock, (Miss.) 17 So. Rep. 736.

5. Conley *v.* Fisher, Taney (U.S.) 121; Wallace *v.* Finberg, 46 Tex. 35; Freiberg *v.* Elliott, (Tex.) 8 S. W. Rep. 322; Willis *v.* McNatt, 75 Tex. 69, 12 S. W. Rep. 478; Jacobus *v.* Monongahela Nat. Bank, 35 Fed. Rep. 395.

And the jury may be justified in finding the value of the goods to be that placed upon them by the owner, although at an auction sale by the officer they may have sold for much less. Willis *v.* Lowry, 66 Tex. 540, 2 S. W. Rep. 449; Woolner *v.* Spalding, 65 Miss. 204, 3 So. Rep. 583.

When both real and personal property have been attached and the owner has not been deprived of the use and occupation of the realty, the value of personal property becomes immaterial on a question of damages.

damages is not the value of the goods as recited in the officer's return, but the value thereof, less the amount (if any) which the plaintiff has received from the proceeds of the sale of them.[1] If the goods that have been seized and carried away were the property of a retail dealer therein, he will be entitled to recover the fair retail value of such goods as a part of his damages.[2]

Under the general rule that one can not recover for remote and speculative damages, there can generally be no recovery in an action for a wrongful attachment for injury to credit or loss in business resulting from the attachment, unless exemplary damages are proper.[3] But it is said that where the profits lost are the direct consequence of the seizure and detention, and can be shown as a matter of fact and not as the opinion of witnesses, the same may be recovered.[4]

When the property has been wrongfully taken from the

Imperial Roller Milling Co. *v.* First Nat. Bank, 5 Tex. Civ. App. 686, 27 S. W. Rep. 49.

1. Straub *v.* Wooten, 45 Ark. 112; Blass *v.* Lee, 55 Ark. 329, 18 S. W. Rep. 186.

2. Wehle *v.* Butler, 61 N. Y. 245.

If there be no market for the goods where taken, the same having been intended for a distant market where they were known and sold at a certain price, and the cost of transporting and selling to be at a certain sum, such facts may be rightfully considered in determining the value where seized. Lathers *v.* Wyman, 76 Wis. 616, 45 N. W. Rep. 669.

In an action for the wrongful attachment and sale of an article used by the plaintiff, evidence of its cost price is admissible to aid in determining its value at the time of the alleged conversion. Bunting *v.* Saltz, 84 Cal. 168, 22 Pac. Rep. 1132.

Where the action is brought by the owner of a stock of merchandise to recover damages from the sheriff who in good faith took possession of such stock as the property of a third person, and it is made to appear that the attachment defendant bought back the goods from a stranger who had purchased them at the sheriff's sale, the proper measure of damages would be the sum paid, if it be less than the market value, together with such special damages as he may have suffered from the unlawful taking. Dodson *v.* Cooper, 37 Kan. 346, 15 Pac. Rep. 200.

3. Seattle Crokery Co. *v.* Haley, 6 Wash. 302, 33 Pac. Rep. 650; Mitchell *v.* Harcourt, 62 Iowa 349; Kirbs *v.* Provine, 78 Tex. 353, 14 S. W. Rep. 849; Crymble *v.* Mulvaney, (Colo.) 40 Pac. Rep. 499.

4. Marqueze *v.* Southeimer, 59 Miss. 430; British, etc., Nav. Co. *v.* Sibley, 27 La. Ann. 191.

Where there has been a wrongful attachment of teams and utensils, which the owner was using in the performance of a contract, the profit of which he is prevented from realizing may be taken into account as an ele-

owner and thereafter returned, the measure of damages which he may recover for the detention of property is the value of its use during that time,[1] together with any deterioration in value resulting from the attachment.[2]

Expenses necessarily incurred in regaining possession of personal property wrongfully seized, as well as reasonable hire for the property during the time it was withheld, together with loss of time, if any, by the owner in giving necessary personal attention to the business are recoverable as actual damages.[3] Likewise it has been said attorney's fees are recoverable in an action for actual damages, but only such as were incurred in obtaining the dissolution of the attachment.[4] But the general rule is that attorney's fees can only be recovered as an element

ment of damages when such profit can be clearly ascertained. State *v.* Andrews, (W. Va.) 19 S. E. 385.

When cattle have been seized and removed by the sheriff from the wonted range to a new range with limited grass and water, and they have not made their ordinary and expected increase of weight because thereof, and such attachment proves to be wrongful, the owner may recover in an action therefor whatever gain has been prevented. Hoge *v.* Norton, 22 Kan. 374.

If mortgaged chattels are wrongfully attached and taken from the first mortgagee in an action against the mortgagor, the second mortgagee may, in an action against the attaching creditor for such wrongful attachment, recover any loss occasioned to him by reason of any impairment of his security which the attachment caused. Taylor *v.* Hines, 31 Mo. App. 622.

But where shares of stock have been wrongfully taken in garnishment process, the difference in value between the time of garnishment and the time of trial is not an element of damages, unless it be shown that the depreciation was caused by the garnishment, or that the owner could or would have sold the stock within that time. Giraud *v.* Moore, 86 Tex. 675.

1. Munnerlyn *v.* Alexander, 38 Tex. 125; Turner *v.* Younker, 76 Iowa 258, 41 N. W. Rep. 10; Adams *v.* Gillam, 53 Kan. 131, 36 Pac. Rep. 51.

2. Patton *v.* Garrett, 37 Ark. 605.

And where money has been garnished unlawfully and detained, the verdict for damages should include interest at the legal rate during the period of detention, and if the money has been released before the action for damages is brought, the sum ascertained as interest during the detention should have added to it interest thereon at the legal rate from the time the sum garnished was released until the time the verdict in the damage suit is rendered. Biering *v.* First Nat. Bank, 69 Tex. 599, 7 S. W. Rep. 90.

3. Jones *v.* Lamon, 92 Ga. 529, 18 S. E. Rep. 423; Marqueze *v.* Southheimer, 59 Miss. 430; Goodbar *v.* Lindsley, 51 Ark. 380, 11 S. W. Rep. 577.

4. Fry *v.* Estes, 52 Mo. App. 1.

of exemplary damages when the attachment has not only been wrongful, but malicious.[1]

Such are the general principles governing the recovery of actual damages not only at suit of a stranger to the writ whose rights have been molested, but also in an action sounding in tort brought by the attachment defendant against the plaintiff for wrongfully suing out or levying the writ when no "malice" or want of "probable cause" is alleged. Some specific rules governing the recovery in an action on the bond may also be relevant here, but need not be repeated.[2]

Part II. Liability for Malicious Attachment—Punitive Damages.

§ 370. **Nature of the action, and by what supported.**—Under the heading "Action on the Bond" we considered the attachment plaintiff's liability to the defendant for mere wrongful attachment as enforcible in an action on the contract.[3] In the preceding part of this chapter we have treated of his liability to the attachment defendant, and to third persons as well, in an action sounding in tort for mere wrongful attachment and for the *actual* damages only. Now we will consider the liability of the attachment plaintiff to the attachment defendant for having caused an attachment not only wrongfully but *maliciously*, and without "probable cause." An action for malicious attachment is a common law action, in form *ex delicto*. It is an "action on the case," in the nature of an action for malicious prosecution and governed by the same rules so far as possible.[4] It is not an action in which the right of the attachment can be questioned; for that can only be done in the attachment proceedings themselves, and not in a collateral action.[5] But it is an action in which punitive or exemplary damages can be re-

1. See *post*, § 378.

2. See *ante*, § 190. As to the recovery of exemplary damages in "Malicious Attachment," see *post*, § 377.

3. *Ante*, § 182.

4. Pixley *v.* Reed, 26 Minn. 80; Board of Supervisors *v.* Stahl, 48 Wis. 593; Donnell *v.* Jones, 13 Ala. 490; Senecal *v.* Smith, 9 Rob. (La.) 418.

"Trespass" is not the proper form of action. Shaver *v.* White, 6 Munf. (Va.) 110.

5. Rogers *v.* Pitman, 2 Jones L. (N. C.) 56; Durr *v.* Jackson, 59 Ala. 203.

covered, for the injury to the alleged debtor's property or reputation, which has resulted from the attachment.[1]

To support an action for malicious attachment, three things must concur. There must be (1) want of "probable cause," (2) malice and (3) damages occasioned to the attachment defendant.[2] The action does not contemplate mere "irregularity" in the attachment proceeding, but the suing out of the writ for the purpose of oppression and wrong.[3] And to sustain a recovery it must have had that result.

Furthermore, where the attachment was sued out maliciously and without probable cause, the action will lie, even though it be issued auxiliary to a civil action rightfully begun,[4] and even though the plaintiff may have prevailed in that suit.[5]

§ 371. **Probable Cause — Definition of, and necessity for.**— "Probable cause" is defined to be the existence of such facts and circumstances as would excite the belief in a *reasonable mind*, acting on the facts within its knowledge, that the charges made were in fact true.[6] Probable cause for suing out an attachment is a belief in the mind of the creditor that facts essentially to the foundation of his attachment existed when such belief is founded on facts sufficient to convince a man of ordinary caution and prudence.[7] Probable cause for believing that the state of facts exists must be based on competent evi-

1. An action for malicious prosecution may also include injury to the person of the defendant. Bump *v.* Betts, 19 Wend. (N. Y.) 421, but this is scarcely contemplated by "malicious attachment" of property.

2. Jones *v.* Fruin, 26 Neb. 76, 42 N. W. Rep. 283; Board of Supervisors *v.* Stahl, 48 Wis. 593; Preston *v.* Cooper, 1 Dill C. C. 589; Lawrence *v.* Hagerman, 56 Ill. 68; Day *v.* Bach, 14 J.& S. (N. Y. S.) 460, affirmed in 87 N. Y. 56; McKellar *v.* Couch, 34 Ala. 336; Sledge *v.* McLaren, 29 Ga. 64; Wilcox *v.* McKenzie, 75 Ga. 73; LeClear *v.* Perkins, (Mich.) 61 N. W. Rep. 357; Melvin *v.* Chancy, (Tex. Civ. App.) 28 S. W. Rep. 421.

How far malice will be presumed to have been the incentive when there was no "probable cause" will be considered hereinafter. See *post*, § 372.

3. Williams *v.* Hunter, 3 Hawks (N. C.) 545.

4. Fortman *v.* Rottier, 8 Ohio St. 548.

5. White *v.* Dingley, 4 Mass. 433; Lindsay *v.* Larned, 17 Mass. 190; Vandusor *v.* Linderman, 10 Johns. (N. Y.) 106; Bump *v.* Betts, 19 Wend. (N. Y.) 421.

6. Wheeler *v.* Nesbitt, 24 How. (U. S.) 544; Brewer *v.* Jacobs, 27 Fed. Rep. 217; Barrett *v.* Spaids, 70 Ill. 408.

7. Burkhart *v.* Jennings, 2 W. Va. 242.

dence.[1] There must be reasonable grounds to believe the truth of the facts alleged in the affidavit, but the law does not require the highest degree of care or absolute certainty.[2] The attachment plaintiff has a right to act on facts and circumstances brought to his knowledge through the usual and ordinary business channels. If he believe them to be true, and if such facts and circumstances were of such character, and came from such sources, that persons of his class, of ordinary care, prudence and discretion, would act upon them under similar circumstances, believing them to be true, then such facts and circumstances, if believed by the creditor to be true, will constitute probable cause.[3] Neglect to pay the debt that is due, or mere carelessness in the conduct of business, will not justify a belief that a debtor is about to dispose of his property, with intent to defraud his creditors.[4] Nor will an allegation that the debtor has departed the state, etc., be justified by showing that by common reputation in the neighborhood in which the debtor resided, it was supposed that he had gone into an adjacent state on a visit of business or pleasure.[5] But a letter from the debtor declaring in effect his intention to repudiate a debt admitted to be due, and to avoid its payment by some means, if the creditor persists in his attempts to collect the claim by legal methods in common use, gives probable cause for attachment.[6]

When the facts constituting the ground of belief are *admitted* to be true, the question as to whether or not they constitute probable cause is a question of law for the court.[7]

The rule generally obtains that no action for malicious attachment can be supported, unless there is a want of probable cause. In other words, that the non-existence of the state of facts on which the attachment has sued out is not sufficient to

1. Brand *v.* Hinchman, 68 Mich. 590, 36 N. W. Rep. 664.
2. Carey *v.* Gunnison, 51 Iowa 202.
3. Leyser *v.* Field, (N. M.) 23 Pac. Rep. 173.
4. Brand *v.* Hunchman, 68 Mich. 590, 36 N. W. Rep. 664.
5. Pitts *v.* Burroughs, 6 Ala. 733.
6. Grant *v.* Reinhart, 33 Mo. App. 74.
7. Sanders *v.* Hughes, 2 Brev. 495; Huntington *v.* Gault, 81 Mich. 144; see statement of the rule below, § 372.

support this action, but that it must also be made to appear that the creditor had no reasonable grounds to believe that they did exist.[1] For if he had reasonable grounds to believe in their existence, the *gist* of the action, which is malice, can not be imputed to him.

§ 372. **Malice, and how established.**—Malice, or a pre-disposition on the part of the creditor to vex, harass and oppress the debtor by the attachment, is as essential as want of probable cause, to recover exemplary damages in an action for malicious attachment. They are distinct ingredients of the wrong and the burden is upon the plaintiff to make them both to appear.[2] Where it is shown that a creditor sued out an attachment knowing he had no sufficient grounds therefor; that is, where it is shown that the grounds stated in the affidavit were known not to exist, the requisite malice appears.[3] Many cases go further and say that if it be shown that the creditor had no reasonable cause for believing the alleged grounds to exist, malice may be inferred from his wrongful act, without proof of ill will; in other words, that malice may be presumed from a want of probable cause.[4] But a more reasonable statement of the rule seems to be that "malice" is not an inference of *law*

1. Collins *v.* Shannon, 67 Wis. 441, 30 N. W. Rep. 730; King *v.* Montgomery, 50 Cal. 115; McCullough *v.* Grishobber, 4 Watts & S. (Pa.) 201; Smith *v.* Story, 4 Hump. (Tenn.) 169; Williams *v.* Hunter, 3 Hawks (N. C.) 545. *Contra*, Yarborough *v.* Weaver, 6 Tex. Civ. App. 215, 25 S. W. Rep. 468.

2. Grant *v.* Reinhart, 33 Mo. App. 74; Accessory Transit Co. *v.* McCerren, 13 La. Ann. 214; Jones *v.* Fruin, 26 Neb. 76, 42 N. W. Rep. 283; Lindsay *v.* Larned, 17 Mass. 190.

3. Ives *v.* Bartholomew, 9 Conn. 309; Willis *v.* McNatt, 75 Tex. 69, 12 S. W. Rep. 478; Savage *v.* Brewer, 16 Pick. (Mass.) 453; McCardle *v.* McGinley, 86 Ind. 538; Tomlinson *v.* Warner, 9 Ohio 104; Brand *v.* Hinchman, 68 Mich. 590; Eastin *v.* Bank, 66 Cal. 123.

Even though no seizure of property was made. Eastin *v.* Bank, 66 Cal. 123.

4. Spengler *v.* Davy, 15 Gratt. (Va.) 381; Bozeman *v.* Shaw, 37 Ark. 160; Durr *v.* Jackson, 59 Ala. 203; Hurlbut, Hess & Co. *v.* Hardenbrook, 85 Iowa 66, 52 N. W. Rep. 510; Kirkham *v.* Coe, 1 Jones (N. C.) L. 423; Grant *v.* Deuel, 3 Rob. (La.) 17; Wood *v.* Weir, 5 B. Mon. (Ky.) 544.

Want of probable cause, clearly proved, may be *prima facie* evidence of malice. Collins *v.* Shannon, 67 Wis. 441.

from the want of probable cause, but that it is an inference of *fact* which the jury may or may not infer from the circumstances which go to establish probable cause.[1] In any event the mere termination of the attachment suit in favor of the attachment defendant will not raise a presumption of want of probable cause, nor will the jury be permitted to presume malice from that fact alone.[2]

Furthermore, proof of malice alone without proof of want of probable cause will not support an action for malicious attachment.[3] Probable cause will protect the creditor in his attachment though he acted maliciously.[4] And where the creditor not only had probable cause, but had just cause, and his attachment was sued out regularly and founded upon a just debt, the court would not hold him liable in damages, although he acted maliciously and directed the officer to take perishable property and to refuse to give it up to a receiptor.[5]

1. Grant *v.* Reinhart, 33 Mo. App. 74; Willis *v.* McNeill, 57 Tex. 465.

2. Leyser *v.* Field, (N. M.) 23 Pac. Rep. 173.

3. Gurley *v.* Tomkins, 17 Colo. 437, 30 Pac. Rep. 344.

4. Senecal *v.* Smith, 9 Rob. (La.) 418.

5. Batchelder *v.* Frank, 49. Vt. 90.

Some circumstances held to be sufficient to support the action.—Where an attachment was sued out before the debt was matured, and more property was seized than was necessary to satisfy the demand; and another attachment was sued out the next day in a different court, it was held to be vexatious and oppressive, entitling the debtor to damages. Watson *v.* Kennedy, 8 La. Ann. 280.

An affidavit, which stated that the debtors were about to convert their property into money to defraud their creditors, when made by a person having knowledge of the manner in which their debtors conducted the business, without affiant's having made any effort to ascertain if there was ground for attachment, was held to be wrongful when it was shown that the debtor's business was prosperous, their mercantile standing first-class; that the debtors had expressed to the creditors a willingness to pay the debt and had suggested different ways in which it might be done but a few days before; and where the agent of the creditor testified that his reason for suing out the writ was his fear that other creditors might give them trouble, and that he intended to buy the goods at the sale if he could get them cheap, and that the profits thereon were to go to his principal, the creditor. Willis *v.* McNatt, 75 Tex. 69.

An affidavit alleging that affiant had good reasons to believe, and did believe, that the debtor was about to depart from the state with intention of removing his effects from the state, was not supported by showing that the creditor had called on the debtor and informed him he understood he intended to go away, and asked him

§ 373. Advice of counsel as evidence of probable cause and in negation of malice. — An honest belief possessed by the creditor, founded on sufficient evidence, to the effect that he has grounds for attaching the property of his debtor, will, as shown, free him from the charge of malice. For that purpose then, one charged with the malicious prosecution of an attachment, or other suit, often seeks to excuse himself from his wrongful act by showing that he acted under the advice of counsel and therefore did not act maliciously. It is a rule of general application that where the creditor has *honestly* sought the advice of competent and reputable counsel, and after fully and fairly stating his case has pursued the course recommended by such counsel, malice will not be imputed to him

to further secure the debt, and the debtor promising to do so when they met next day, where the creditor sued out the attachment before they met. It was held to be malicious, and damages were awarded to the amount of $750 when the amount due was $200. Nelson *v.* Danielson, 82 Ill. 545.

The debtor having more than sufficient property to pay all his debts was disposing of the goods in the usual course of trade. A creditor came to him for settlement and he offered to give a mortgage on all his property except one piece, which was already mortgaged. The creditor pretended to agree to this and procured a list of the defendant's property and then threatened to attach it unless the entire claim was paid. This was held sufficient to warrant the finding of malice. Parks *v.* Young, 75 Tex. 278, 12 S. W. Rep. 986.

The fact that notices of the attachment were sent to other creditors and to commercial papers is evidence tending to prove malice. Jamison *v.* Weaver, 81 Iowa 212, 46 N. W. Rep. 996. So is the fact that the creditor's demand was groundless or not due, but it is not conclusive evidence of malice. Lemay *v.* Williams, 32 Ark. 166; Nelson *v.* Danielson, 82 Ill. 545.

While the intention and disposition of the attachment creditor can be taken into consideration in determining malice,—Benson *v.* McCoy, 36 Ala. 710; Byford *v.* Girton, (Ia.) 57 N. W. Rep. 558—it is not competent to show that the attachment creditor was angry *after* the time of the attachment levy. Yarborough *v.* Weaver, 6 Tex. Civ. App. 215, 25 S. W. Rep. 468. Nor is it competent to show that he maliciously detained the property after he had learned that his suit was groundless where it is shown the attachment was begun in good faith. Stone *v.* Swift, 4 Pick. (Mass.) 389.

For other cases in which the action was sustained upon particular circumstances, see Grimes *v.* Bowerman, 92 Mich. 258, 52 N. W. Rep. 751; Cadwell *v.* Corey, 91 Mich. 335, 51 N. W. Rep. 888; Farrar *v.* Talley, 68 Tex. 349, 4 S. W. Rep. 558; Dunlap *v.* Fox, (Miss.), 2 So. Rep. 169; Deere *v.* Bagley, 80 Iowa 197, 45 N. W. Rep. 557. *Contra*, Campbell *v.* Hopkins, 87 Ala. 179, 6 So. Rep. 76.

and probable cause is established.[1] Reliance upon the advice of counsel as being a sufficient showing of probable cause is, when the facts are undisputed, considered in some states a question of law.[2] But it is generally treated as a mixed question of law and fact to be submitted to the jury under instructions as to what amounts to probable cause.[3]

Malice, nevertheless, remains a question of fact for the decision of the jury, and the creditor must act in good faith and with an honest purpose, notwithstanding he has taken legal advice.[4] One case states emphatically that although the advice be given under the conditions usually deemed sufficient to constitute probable cause it is not then absolute protection, and that advice of counsel is referable rather to the issue of malice than to the question of want of probable cause, for if it appears from a consideration of all the facts that, notwithstanding the advice of counsel, the action was malicious, the fact of such advice having been taken will afford no protection to the attaching creditor. And if, notwithstanding the advice of counsel, it was unreasonable to believe that a ground for attachment existed, the sole fact of advice of counsel having been taken did not constitute probable cause.[5] Advice of counsel

1. Hulbert, Hess & Co. *v.* Hardenbrook, 85 Iowa 606, 52 N. W. Rep. 510; Stone *v.* Swift, 4 Pick. (Mass.) 389; Roy *v.* Goings, 112 Ill. 656; Whitfield *v.* Westbrook, 40 Miss. 311; Leaird *v.* Davis, 17 Ala. 27; Levi *v.* Brannan, 39 Cal. 489; Ash *v.* Marlow, 20 Ohio 119; Alexander *v.* Harrison, 38 Mo. 258; Sappington *v.* Watson, 50 Mo. 83; Levy *v.* Fleischner, (Wash.) 40 Pac. Rep. 384.

This is the rule applicable to actions for the malicious prosecution of civil cases generally. In an action for malicious prosecution of a criminal case the rule is different. It there only goes in mitigation of damages. Josselyn *v.* McAllister, 22 Mich. 300; 1 Sutherland on Damages, 237; Newell on Malicious Prosecution, 325.

2. Driggs *v.* Burton, 44 Vt. 124; Ball *v.* Rawles, 93 Cal. 222; Humphreys *v.* Parker, 52 Me. 502; Heyne *v.* Blair, 62 N. Y. 19; Travis *v.* Smith, 1 Pa. St. 234.

3. Schattgen *v.* Holnback, 149 Ill. 646; Masten *v.* Deyo, 2 Wend. (N. Y.) 424; Wilder *v.* Holden, 41 (24 Pick.) Mass. 8; Ash *v.* Marlow, 20 Ohio 119; Speck *v.* Judson, 63 Me. 207.

4. Roy *v.* Goings, 112 Ill. 656; Myers *v.* Wright, 44 Iowa 38; Callahan *v.* Caffarata, 39 Mo. 136; Sharpe *v.* Johnston, 59 Mo. 557; Humphreys *v.* Parker, 52 Me. 502; Mowrey *v.* Whipple, 8 R. I. 360; Straus *v.* Young, 36 Md. 246; Forbes *v.* Hagman, 75 Va. 168; Clossen *v.* Staples, 42 Vt. 209; Sloan *v.* Langert, 6 Wash. 26, 32 Pac. Rep. 1015.

5. Brewer *v.* Jacobs, 22 Fed. Rep. 217.

can not be shown in justification of a false affidavit or a colorable demand.[1] The good faith with which the advice is sought, and likewise followed, is of the first importance. The facts and circumstances tending to show probable cause must be stated to the attorney, and not personal conclusions; and the attorney must be one in good standing, possessing skill, prudence and fairness.[2] It is not sufficient that the creditor follow the advice of a justice of the peace or other person not learned in law. He must follow the advice of one who, by his professional training and experience as an officer of the court, may be reasonably supposed to be competent to give safe and prudent counsel.[3]

§ 374. **Not liable for malicious act of agent.**—A wrongful attachment, brought by the agent of a creditor acting within the scope of his authority, will render the creditor liable for actual damages, as hereinbefore shown, but when such agent acts *maliciously* he is presumed to so act without authority, and while he clearly renders himself liable, the creditor is not thereby rendered liable as for malice, unless it be shown that he aided, abetted, advised, approved, adopted, or ratified such malicious act with full knowledge of all the facts.[4]

1. Jacobs, etc., Co. *v.* Crum, 4 Tex. Law Review, 313.

2. Schattgen *v.* Holnback, 149 Ill. 646; Anderson *v.* Friend, 71 Ill. 475; Roy *v.* Goings, 112 Ill. 656; Baldwin *v.* Walker, 94 Ala. 514, 10 So. Rep. 391.

3. Olmstead *v.* Partridge, (16 Gray) 82 Mass. 381; Moore *v.* Sauborin, 42 Mo. 494.

The fact that the attorney consulted was not then engaged in practice and was a stockholder or officer of the corporation does not exclude from the evidence the fact that the creditor (a corporation) took the advice of such counsel. Charles City Plow & Mfg. Co. *v.* Jones, 71 Iowa 234, 32 N.W. Rep. 280.

4. Oberne *v.* O'Donnell, 35 Ill. App. 180; Baldwin *v.* Walker, 91 Ala. 428; Willis *v.* McNeill, 57 Tex. 465; Wallace *v.* Finberg, 46 Tex. 35; Tynberg *v.* Cohen, 67 Tex. 220; 2 S. W. Rep. 734; Pollock *v.* Gantt, 69 Ala. 373; Kinsey *v.* Wallace, 36 Cal. 462; Empire Mill Co. *v.* Lovell, 77 Iowa 100; Schroder *v.* Morehouse, 92 Mich. 602.

Where the attaching creditor by request of his attorney, without knowledge either of the grounds on which the attachment was sued out or of any malicious or vexatious conduct on the part of the attorney authorized to collect the debt, furnishes security on the attachment bond, it is no evidence of ratification of such malicious conduct. Baldwin *v.* Walker, 91 Ala. 428, 8 So. Rep. 364.

Acts of the sheriff at the time of

§ 375. **When the action may be begun.**—Unless there be a statute to the contrary, the courts follow the common law rule universally recognized in actions for malicious prosecution, and will not sustain an action for malicious attachment until the attachment has been legally determined in the debtor's favor; and such fact must be alleged in the pleading and proved by the evidence. But it is not necessary that the main action on which the attachment was sued out shall have been terminated.[1] It seems, however, that when the termination of the attachment suit can neither tend to establish nor invalidate the alleged debtor's cause of action for malicious attachment, it is not necessary to aver the termination thereof, nor is it essential that the attachment shall have been discharged or otherwise terminated in favor of the alleged debtor.[2] It has likewise been said in one case that if the attachment defendant allege and show that he had no opportunity to make a motion to vacate the attachment it will be sufficient.[3] In another case where the validity of the debt on which the attachment was issued was not disputed, an action for maliciously suing out an excessive

making the levy and what passed between him and the creditor's attorney who directed it is admissible to show the creditor's connection with the levy. Ullman *v.* Myrick, 93 Ala. 532, 8 So. Rep. 410.

In a case where the creditor and his attorney went on the same train to the town where the debtor resides and the attorney procures of the debtor a note due on demand, and without making demand for payment and knowing that a partner has just received a large sum of money, sues the firm in attachment, and afterwards states that the purpose in procuring the note due on demand was that he might commence suit by attachment, the creditor was held liable as being in collusion with the attorney. Grimes *v.* Bowerman, 92 Mich. 258, 52 N. W. Rep. 751.

1. Bliss *v.* Heasty, 61 Ill. 338; Feazle, *v.* Simpson, 1 Scam. (Ill.) 30; Rossiter *v.* Minnesota Bradner-Smith Paper Co., 37 Minn. 296, 33 N. W. Rep. 855; Jackson *v.* Colcord, 114 Mass. 60; Sloan *v.* McCracken, 7 Lea (Tenn.) 626; Hamilburgh *v.* Shepard, 119 Mass. 30; Brown *v.* Randall, 36 Conn. 56; Feltt *v.* Davis, 49 Vt. 151; Gorrell *v.* Snow, 31 Ind. 215.

But an omission of the averment in the declaration of the termination of the attachment, etc., has been held to be cured by verdict. Spaids *v.* Barrett, 57 Ill. 289; Rea *v.* Lewis, Minor, (Ala.) 382.

2. Cadwell *v.* Corey, 91 Mich. 335, 51 N. W. Rep. 888; Brand *v.* Hinchman, 68 Mich. 590, 36 N. W. Rep. 664; Fortman *v.* Rottier, 8 Ohio St. 548.

3. Pixley *v.* Reed, 26 Minn. 80.

attachment was sustained before the attachment suit was terminated.[1]

In Alabama, by virtue of the provision of the code, an action on the case for malicious attachment need not be delayed until after the attachment suit is terminated, but whenever any original attachment has been wrongfully or vexatiously issued, the defendant therein may, at any time, commence suit against the plaintiff and recover the damages to which he may be entitled on account thereof.[2]

Where the plaintiff in the attachment suit has prevailed, no action will lie against him unless his attachment was malicious and without probable cause.[3]

§ 376. **Pleadings in the action.**[4]—That the party bringing an action for malicious attachment must, in his declaration or complaint, aver the termination of the attachment proceeding in favor of the alleged debtor, except when the termination of such attachment can neither tend to establish nor invalidate such party's cause of action; and also that a verdict will cure such lack of averment, has been shown in the last preceding section.

The want of probable cause and the existence of malicious motives being both essential ingredients to a malicious attachment, it is necessary, in order to sustain an action thereon, that there be an allegation in the declaration or complaint of

1. Zinn *v.* Rice, 154 Mass. 1, 27 N. E. Rep. 772.

2. Seay *v.* Greenwood, 21 Ala. 491; Donnell *v.* Jones, 13 Ala. 490.

3. White *v.* Dingley, 4 Mass. 433; Lindsay *v.* Larned, 17 Mass. 190; Vanduzor *v.* Linderman, 10 Johns. N. Y. 106.

4. The joinder of parties in an action for malicious attachment is governed by the ordinary rules in regard thereto in actions for torts; that is to say, when the injury complained of was not an injury to a joint interest, but to an individual interest, the individual injured need not of necessity join the other parties defendant in the attachment suit with him as plaintiffs in the damage suit for malicious attachment. 1 Chitt. Pl. 63 and 64.

Therefore, where an attachment was maliciously sued out on a claim against a partnership, and the effects of the only responsible member was seized, causing the destruction of the business and the loss of his individual property, he alone was properly permitted to recover in the individual action therefor, especially where the attachment was made in collusion with an irresponsible member of the firm. Grimes *v.* Bowerman, 92 Mich. 258, 52 N. W Rep. 751.

both a want of probable cause for bringing the attachment, and that the creditor was actuated by malice toward the debtor.[1] But it is not necessary that such declaration or complaint should aver that the attachment was sued out "without any reasonable or probable cause" or any other particular form of words. Language having the same meaning may be used, for it will be sufficient if the necessary averment is included in the sense of the declaration. It is held that an averment which negatives the existence of probable cause is equivalent to the positive assertion of a want of probable cause.[2]

As to the averments of damages it is only necessary here to call attention to the general common law rule for the recovery thereof; that they must be the natural proximate consequence of the wrong done and not the remote or accidental result; and that no special damages can be recovered unless they are counted upon and claimed in the complaint.[3]

1. King *v.* Montgomery, 50 Cal. 115; Preston *v.* Cooper, 1 Dillon 589.

A complaint, alleging that the creditor, "without probable cause, wrongfully, unlawfully and maliciously, and with intent to injure the plaintiff, sued out a writ of attachment, and had the plaintiff's property seized thereunder and sold, to the plaintiff's damage $10,000," is sufficient in Texas. Brooks *v.* Sanger, 69 Tex. 24, 7 S. W. Rep. 355.

Likewise the averment "that said order of attachment was wrongfully and maliciously sued out, and no just grounds existed for issuing the same, and the statements in said affidavit as ground therefor, were and are false and untrue," is sufficient in Nebraska. Jones *v.* Fruin, 26 Neb. 76, 42 N. W. Rep. 283.

And in Minnesota an allegation that the affidavit for the attachment was false in every particular, and so known to be by the affiant at the time, was held sufficient where only a general objection was made, at the time of the trial, to the admission of evidence under it. Beyersdorf *v.* Sump, 39 Minn. 495, 41 N.W. Rep. 101.

2. Spaids *v.* Barrett, 57 Ill. 289; Savage *v.* Brewer, 16 Pick. (Mass.) 453; Maddox *v.* McGinnis, 7 J. B. Mon. (Ky.) 371; Young *v.* Gregory, 3 Call (Va.) 446; Kinsey *v.* Wallace, 36 Cal. 462.

3. Pollock *v.* Gantt, 69 Ala. 373.

The following was in Nebraska held to be a sufficient averment of damage to credit and business, and of the incurring of attorney's fees and other expense in order to sustain a recovery thereon: "That at the time said goods and chattels were levied upon, the plaintiff was engaged in the business of ——, in which business the plaintiff used said goods and chattels, and by reason of said wrongful levy the plaintiff was interrupted and hindered in his business for —— days, and thus plaintiff's business was wholly lost to him; that the team of horses, by reason of standing in the stable without sufficient exercise was greatly injured and damaged. Plaintiff has been put

§ 377. Damages recoverable—(a) When exemplary damages and when only actual damages.—In an action for wrongful and malicious attachment the burden of proof is upon the plaintiff,[1] and to entitle him to any damages, the want of probable cause must be shown by some affirmative evidence; unless the defendant has dispensed with the necessity therefor by pleading singly the truth of the facts involved in the prosecution.[2] Proof of malice is unimportant except for the recovery of exemplary damages. The attaching creditor is liable for actual damages occasioned by wrongful attachment, even though he acts without malice and under the advice of legal counsel.[3] But to recover exemplary damages there must be proof that the attachment was malicious, in which case the jury may award all damages which are shown to be the proximate result of the attachment. And not more than sufficient to compensate him for the injury really sustained, including expenses incurred in and about the suit, and injury or destruction of his credit or business.[4]

to great expense and trouble in and about procuring the discharge of said attachment, and has been compelled to pay out a large sum of money as attorney's fees, and was greatly injured in his credit by reason of said illegal suing out of said writ, all in the sum of —— dollars as aforesaid sustained." Jones *v.* Fruin, 26 Neb. 76, 42 N. W. Rep. 283.

1. See *ante*, § 372.

2. II Greenl. Ev. § 454; O'Grady *v.* Julian, 34 Ala. 88.

3. McDaniel *v.* Gardner, 34 La. Ann. 341; Steinhardt *v.* Leman, 41 La. Ann. 835, 6 So. Rep. 665; Chaffe *v.* Mackenzie, 43 La. Ann. 1062, 10 So. Rep. 369; Fry *v.* Estes, 52 Mo. App. 1; Myers *v.* Farrell, 47 Miss. 281; Heidenheimer *v.* Sides, 67 Tex. 32, 2 S. W. Rep. 87. As to the measure of actual damages, see *supra*, § 369.

4. Grimes *v.* Bowerman, 92 Mich. 260; Kirksey *v.* Jones, 7 Ala. 622; Ellis *v.* Bonner, 80 Tex. 198, 15 S. W. Rep. 1045; Mayer *v.* Duke, 72 Tex. 445, 10 S. W. Rep. 565; Kauffman *v.* Babcock, 67 Tex. 241, 2 S. W. Rep. 878; Blum *v.* Stein, 68 Tex. 608, 5 S. W. Rep. 454; Rogers *v.* Pitman, 2 Jones (N. C.) L. 56; Turner *v.* Hardin, 80 Iowa 691, 45 N. W. Rep. 758; Bloch *v.* Creditors, 46 La. Ann. 1334, 16 So. Rep. 267; Levy *v.* Fleischner, (Wash.) 40 Pac. Rep. 384.

And where the plaintiff in this action alleged that by reason of an attachment of his mortgaged homestead and growing corn, he was prevented from selling the corn and raising money to pay off the mortgage, and the same was foreclosed and the homestead lost to him, it was held that the levy on the homestead was not the proximate cause of the loss, the homestead having brought its full value at the foreclosure sale. State *v.* Springer, 45 Mo. App. 252.

And damages will be too remote which are alleged to have been caused

§ 378. (b) **Costs and attorney's fees.**—All costs and expenses necessarily incurred because of the wrongful and malicious attachment may be considered by the jury in determining the damages to be awarded. In this may be included such fees as have been necessarily paid or contracted to be paid for the service of attorneys in order to retain possession of property and in defense of the attachment suit.[1]

§ 379. (c) **Loss of credit or damage to business.**—In an action on the case at common law for malicious attachment, when properly averred in the pleading, the plaintiff may recover full compensation for loss of credit, breaking up of business, loss of customers, and prospective profits and injury to his reputation resulting from the wrongful and malicious attachment.[2]

by newspaper statements, that the attachment defendants had failed, that goods they had not paid for were taken back by creditor who had sold them, and that they were obliged to pay for other goods in order to keep them, which newspaper statements are alleged to have been the result of the attachment. Tynberg *v.* Cohen, 76 Tex. 409, 13 S. W. Rep. 315.

1. Walser *v.* Thies, 56 Mo. 89; Hughes *v.* Brooks, 36 Tex. 379; Yarborough *v.* Weaver, 6 Tex. Civ. App. 215, 25 S. W. Rep. 468; Jones *v.* Doles, 3 La. Ann. 588; Adam *v.* Gomila, 37 La. Ann. 479.

Even the fees paid to counsel for defending the original suit were permitted to be taken into consideration in Alabama. Marshall *v.* Betner, 17 Ala. 832. But not fees paid when property was not sold under the attachment and of which she was not dispossessed. Baldwin *v.* Walker, 94 Ala. 514, 10 So. Rep. 391. Nor were attorney's fees paid for making a motion for a new trial where judgment had been permitted to be entered by default in the attachment suit. Trammell *v.* Ramage, 97 Ala. 666, 11 So. Rep. 916. Nor for expenses for a voluntary appearance where no levy had been made. Flournoy *v.* Lyon, 70 Ala. 308.

2. Lawrence *v.* Hagerman, 56 Ill. 68; Lewis *v.* Taylor, (Tex. Civ. App.) 24 S. W. Rep. 92; Tynberg *v.* Cohen, 76 Tex. 409, 13 S. W. Rep. 315; Parks *v.* Young, 75 Tex. 278, 12 S. W. Rep. 986; Kaufman *v.* Armstrong, 74 Tex. 65, 11 S. W. Rep. 1048; Tynberg *v.* Cohen, (Tex. Civ. App.) 24 S. W. Rep. 314; Mayfield *v.* Cotton, 21 Tex. 1; Kennedy *v.* Meacham, 18 Fed. Rep. 312; Marx *v.* Strauss, 93 Ala. 453, 9 So. Rep. 818; Bradley *v.* Borin, 53 Kan. 628, 36 Pac. Rep. 977; Pettit *v.* Mercer, 8 B. Mon. (Ky.) 51; MacFarland *v.* Lehman, 38 La. Ann. 351; Blynn *v.* Smith, 4 N. Y. S. 306.

Evidence of an account of the attachment proceedings in a daily newspaper and proof of its circulation is properly admissible under a proper allegation; because such publication would naturally tend to injure one's credit or business. Brand *v.* Hinchman, 68 Mich. 590, 36 N. W. Rep. 664.

But a false announcement in a

It has been said, however, that where the debtor was insolvent when the attachment was wrongfully sued out, he will not be allowed damages to his credit and reputation as a merchant because of the fact that persons who had trusted him without knowing that he was insolvent refused thereafter to extend credit to him.[1] And the loss of prospective profits of an insolvent debtor which he might have made in his business, had it not been interrupted by the attachment in question, is too remote; especially where he has transferred much of his property to other creditors in security for their debts.[2]

The recovery of exemplary damages must be based upon the right to recover actual damages, and where there is no right of action for actual damages there can be recovery of exemplary damages for loss of credit and injury to the debtor's feelings.[3] And when the jury are correctly informed that damage for injury to the debtor's credit may be recovered because of the attachment having been maliciously issued and without prob-

newspaper of the debtor's failure in business, in consequence of which a certain firm refused to ship him goods, can not be shown in evidence when such publication was not the act of the creditor, because levying an attachment did not authorize such publication. Tynberg *v.* Cohen, (Tex. Civ. App.) 24 S. W. Rep. 314.

But the plaintiff's conclusions as to what his credit is worth and the gross amount of loss sustained is not admissible. He should testify to facts, such as good credit, business capacity, capital and liabilities, from which the jury may draw the conclusions as to the damages done. Hernsheim *v.* Babcock, (Tex.) 2 S. W. Rep. 880; Kauffman *v.* Babcock, 67 Tex. 241, 2 S. W. Rep. 878; Chaffe *v.* Mackenzie, 43 La. Ann. 1062, 10 So. Rep. 369.

But it is incompetent to show that his business has steadily increased from year to year for several years, and that it has decreased for the part of the year since the attachment. Zinn *v.* Rice, 161 Mass. 571, 37 N. E. Rep. 747.

But the fact that the debtor was prevented from borrowing money is too remote. Marx *v.* Strauss, 93 Ala. 453, 9 So. Rep. 818; Girard *v.* Moore, (Tex. Civ. App.) 24 S. W. Rep. 652.

And the fact that the lawful issuance of several executions was precipitated by the attachment is incompetent. Goodbar *v.* Lindsley, 51 Ark. 380, 11 S. W. Rep. 577.

But that other attachments followed immediately may be considered by the jury if they are believed to have resulted from the wrongful attachment. Grimes *v.* Bowerman, 98 Mich. 288, 52 N. W. Rep. 751.

1. Chaffe *v.* Mackenzie, 43 La. Ann. 1062, 10 So. Rep. 369.

2. Braunsdorf *v.* Fellner, 76 Wis. 1, 45 N. W. Rep. 97.

3. Traweek *v.* Martin-Brown Co., 79 Tex. 460, 14 S. W. Rep. 564.

able cause, it is immaterial whether the court speak of such damage as being actual or exemplary.[1]

§ 380. **What may be shown in defense of the action—(a) That the attachment proceedings are still pending.**—Wherever it is required that the attachment proceedings must have terminated in favor of the attachment defendant before he can bring an action for the recovery of damages for wrongful or malicious attachment, it will be a complete defense to such action when brought, to allege and show, that the attachment proceedings have not reached a final determination, but that an appeal has been taken from the order vacating the attachment, that a stay of proceedings has been ordered and that such appeal is still undetermined.[2]

§ 381. **(b) That the attachment was not without probable cause.**[3]—In defense of the allegation that the attachment was sued out without probable cause, it is competent and sufficient for the defendant to show either that he had actual grounds for the issuance of the attachment, or that he had good cause to believe that the grounds stated in the affidavit did exist.[4] This being established the suit will entirely fail, for, as hereinbefore shown, the existence of malice when the attachment was not sued out without cause will be unavailing.[5] No evidence

1. Biering *v.* First Nat. Bank, 69 Tex. 599, 7 S. W. Rep. 90.

2. Peck *v.* Hotchkiss, 52 How. (N. Y.) Pr. 226; Feiber *v.* Smith, 6 N. Y. S. 446.

3. A plea averring that the attachment "was not sued out wrongfully, maliciously, or vexatiously or without probable cause" has been held to present substantial defense to the action and therefore not to be admissible. Marshall *v.* Betner, 17 Ala. 832.

The defendant may properly put in evidence the affidavit for attachment and other proceedings. Blanchard *v.* Brown, 42 Mich. 46.

4. Dent *v.* Smith, 53 Iowa 262; Petty *v.* Lang, 81 Tex. 238, 16 S. W. Rep. 999.

5. *Ante*, § 372.

A wrongful allegation of the existence of a ground for attachment can not be supported by proof of the existence of other grounds. Kirksey *v.* Jones, 7 Ala. 622. See *ante*, "Grounds for Attachment" and "Affidavit." Although it might, perhaps mitigate the damages. Woods *v.* Huffman, 64 Tex. 98.

Where damages are sought because an attachment was sued out on the ground that the debtor was about to remove his property with intent to defraud his creditors, evidence is ad-

will, however, be admitted to justify the illegal attachment of exempt property.[1]

§ 382. (c) **That the attachment was not maliciously sued out.**—While, as we have shown, the creditor will be liable for actual damages where he wrongfully sues out an attachment, yet he can only be held in exemplary damages where the same was done with the malicious intention of injuring the debtor; therefore the creditor may, when an action is brought against him for malicious attachment, defeat the recovery of exemplary damages by showing that he sued out the writ without any malicious intent, even though he be not able to show that his attachment was not wrongful, and be not able to defeat the recovery of actual damages.[2] If he shows that he honestly and in good faith believed the grounds to exist, as alleged in the affidavit, such belief excludes malice.[3] But belief

missible which tends to show that the debtor was removing his property from the county, and that he was clouding his title to the property at the time; because this tends to show a fraudulent intent on his part. O'Neil *v.* Wills Point Bank, 67 Tex. 36, 2 S. W. Rep. 754.

Where the allegation in the affidavit was that the debtor was about to leave the state, etc., it is competent to show what declarations were made by him at the time of his leaving and in explanation thereof, but he can not testify as to his uncommunicated intention to remain within the state, or as to the strength of his affection for the place of his domicile therein. Baldwin *v.* Walker, 91 Ala. 428, 8 So. Rep. 364. Nor can his declaration of intention, made about a week before the attachment and not in the presence of the defendant, nor shown to have come to his knowledge previous to the issuance of the attachment, be proved in evidence. Havis *v.* Taylor, 13 Ala. 324.

Nor can his intent be shown by the testimony of his employes as to instructions given only to them regarding the conduct of the business. Deere *v.* Bagley, 80 Iowa 197, 45 N. W. Rep. 557.

Nor can it be shown by common reputation in the neighborhood in which the creditor lived that it was supposed that the debtor had left the state. Pitts *v.* Burroughs, 6 Ala. 733.

Proof that the debtor declared his intention to pay his creditors is inadmissible. Kaufman *v.* Armstrong, 74 Tex. 65, 11 S. W. Rep. 1048.

1. Rice *v.* Chase, 9 N. H. 178; Brown *v.* Bridges, 70 Tex. 661, 8 S. W. Rep. 502.

2. Sloan *v.* Langert, 6 Wash. 26, 32 Pac. Rep. 1015.

3. Collins *v.* Shannon, 67 Wis. 441, 30 N. W. Rep. 730; Wood *v.* Weir, 5 B. Mon. (Ky.) 544; Baldwin *v.* Mumford, 35 La. Ann. 348.

in the existence of grounds which do not exist will not prevent a recovery of actual damages for the injury sustained.[1]

§ 383. (d) **Proof in mitigation of damages.**—Any relevant fact, tending to prove that the injury the debtor sustained is less than that which he has alleged and sought to prove, may be offered in mitigation of damages. The fact that the goods wrongfully seized were subsequently returned to the debtor may be shown;[2] and that such return was made as soon as notice was received of their exempt character.[3] But such return must have been made to the debtor and not to another for him.[4] Likewise, an offer to return the surplus after the creditor's claim has been satisfied by a sale of the attached property, is competent as tending to show that the creditor had no intention to make an excessive levy.[5]

It is competent to show in mitigation of damages that the plaintiff in this action received the proceeds of the sale made under the attachment, and that his loss was that much lessened.[6]

1. Alexander *v.* Hutchison, 9 Ala. 825; Christian *v.* Seeligson, 63 Tex. 405.

But it seems that the diligence of the creditors, in trying to ascertain the facts, may be shown, although the attachment was groundless. Gurley *v.* Tomkins, 17 Colo. 437, 30 Pac. Rep. 344.

And it has been said in Alabama that the presumption of malice may be rebutted by showing that the debtor was indebted to the attaching creditor in another state and that he had run away and removed his property from there to avoid the payment of his debts. Melton *v.* Troutman, 15 Ala. 535.

2. McFadden *v.* Whitney, 51 N. J. L. 391, 18 Atl. Rep. 62; Montpelier, etc., R. R. Co. *v.* Coffrin, 52 Vt. 17; Lyon *v.* Yates, 52 Barb. (N. Y.) 237.

3. Hynds *v.* Wynn, 71 Iowa 593, 33 N. W. Rep. 73.

4. Property wrongfully seized and given into the possession of another than the attachment defendant will render the attachment plaintiff liable to him for the value of the property, if the same be lost. Farrar *v.* Talley, 68 Tex. 349, 4 S. W. Rep. 558.

And the surrender of attached property to a trustee, who sells it in accordance with the terms of his deed of trust, without the debtor's consent, will render the attaching creditor liable. First Nat. Bank *v.* Houts, 85 Tex. 69, 19 S. W. Rep. 1080.

5. Pollak *v.* Searcy, 84 Ala. 259, 4 So. Rep. 137.

6. Mayer *v.* Duke, 72 Tex. 445, 10 S. W. Rep. 565.

It may be shown in mitigation of damages that a portion of the proceeds of the attached property, was by order of the court applied to the payment of arrears of rent due to the owner of the building in which the property seized

It may be shown in mitigation of damages that the property in question was subsequently seized by another creditor and appropriated to the debt due him, where such subsequent seizure was not made in collusion with the wrong-doer or by one joining with him in the original act; for the subsequent appropriation shows, at least, that since the time the latter attachment was made the injury caused by the former has not continued, any more than if the property had been returned to the debtor at such time.[1] But he can not show in defense of his own wrong that another like attachment was made by the same officer upon the same property at the same time. Showing that others committed a like injury is no defense.[2]

It can not be shown in reduction of damages that, at the time the attachment was made, the debtor contemplated selling his goods in bulk at a sacrifice.[3]

Nor can it be shown in mitigation of damages occasioned by vexatiously and oppressively suing out the writ that the debtor neglected to have the property released by giving bond; for the release of attached property by giving bond is not a requirement, but a privilege which the debtor may or may not resort to, as may best please him.[4]

was stored. Wanamaker *v.* Bowes, 36 Md. 42.

1. Beyersdorf *v.* Sump, 39 Minn. 495, 41 N. W. Rep. 101; Wehle *v.* Spelman, 25 Hun (N. Y.) 99.

But the fact that the creditor making the wrongful attachment, subsequently made a valid attachment upon the same property, can not be shown in defense of the wrongful taking nor in mitigation of damages. Lyon *v.* Yates, 52 Barb. (N. Y.) 237; Tiffany *v.* Lord, 65 N. Y. 310.

2. French *v.* Duncan, 47 Ill. App. 113; Yarbrough *v.* Hudson, 19 Ala. 653.

3. Estes *v.* Chesney, 54 Ark. 463, 16 S. W. Rep. 267.

4. Watson *v.* Kennedy, 8 La. Ann. 280.

CHAPTER XVII.

LIABILITY OF THE EXECUTIVE OFFICER.

§ 384. Liability generally of executive officer and his sureties.
385. Liability for acts of his deputy.
386. Liability for breach of duty regarding levy.
(a) For improper or untimely seizure.
387. (b) For seizure under writ against third party.
388. (c) For seizure of exempt property.
389. (d) For seizure of property in custody of law.
390. (e) For failure to levy as directed.
391. Liability for breach of duty regarding return.
392. Liability for breach of duty regarding custody of attached property.
§ 393. Liability for breach of duty regarding release of property on tender of bond.
394. Liability for failure to return money into court.
395. Liability to defendant for failure to return property on dissolution of attachment.
396. Liability for failure to properly apply chattels on execution.
397. Liability for failure to account for proceeds of sale.
398. Liability for expense of keeping the property pending suit.
399. Defenses to actions brought by third persons.
400. Extent of liability—Judgment.

§ 384. Liability generally of executive officer and his sureties.—An officer, being duly qualified by law to execute writs of attachment, has it incumbent upon him to make a levy upon the property and to the purpose stated in the writ delivered to him.[1] This being his duty the law will hold him to the exercise of it with fidelity. He is required to exercise a strict degree of diligence and caution in the discharge of his duty. If any party be injured by want of diligence on the part of the officer he will have a just cause of action against such officer for the recovery of the damages. The attaching officer is the agent of both parties in the attachment suit, and, therefore,

1. See *ante*, § 202.

owes certain duties to each and may become liable to either for nonfeasance or misfeasance of the powers intrusted to him by law, or in the discharge of his official duties imposed by law.[1]

The duty of the executive officer arises when a writ of attachment, legal in form, issuing from a court having authority to issue writs of attachment against property therein directed to be attached, is placed in his hands, and when there is nothing to notify him or fairly apprise him that it was issued without authority, and he will thereafter be protected in a strict compliance with the mandates of such writ.[2] The officer is not protected in any act committed before a writ directing such act to be performed is actually placed in his hands. His powers and duties depend upon his possession of the process and his authority to execute it. Without the existence of such power and until the process is in his possession he can not be justified in interfering with the property of others.[3] When the

1. Zeigler *v.* Commonwealth, 12 Pa. St. 227; Smith *v.* Orser, 43 Barb. (N. Y.) 187; McKinney *v.* Craig, 4 Sneed. (Tenn.) 577; Scarborough *v.* Malone, 67 Ala. 570; Starr *v.* Moore, 3 McLean 354; Blake *v.* Shaw, 7 Mass. 505.

The liability of the officer to either party may be waived and this is frequently done by the plaintiff in instructing the officer regarding the acts and duties by him to be performed, in which case the plaintiff will become either jointly or severally liable with the officer; and by the defendant in doing and saying that which will constitute an estoppel. Murray *v* Lovejoy, 2 Cliff. (U. S.) 191; "Liability of Plaintiff on the Bond," *ante*, § 182, and "Liability of Plaintiff Beyond the Covenants of the Bond," *ante*, Chapter XVI.

2. Hines *v.* Chambers, 29 Minn. 7; Fulton *v.* Heaton, 1 Barb. (N. Y.) 552; Cleveland *v.* Rogers, 6 Wend. (N. Y.) 438; Day *v.* Bach, 87 N. Y. 56; White *v.* Thompson, 3 Ore. 115; Outhouse *v.* Allen, 72 Ill. 529; Schlenker *v.* Risley, 3 Scam. (Ill.) 483; Mangold *v.* Thorpe, 33 N. J. L. (4 Vroom) 134; Carpenter *v.* Scott, 86 Iowa 563, 53 N. W. Rep. 328; State *v.* Foster, 10 Iowa 435; Garnet *v.* Wimp, 3 B. Mon. (Ky.) 360; Banta *v.* Reynolds, 3 B. Mon. (Ky.) 80; Lovier *v.* Gilpin, 6 Dana (Ky.) 321; Mayer *v.* Duke, 72 Tex. 445; *ante*, § 204.

But an officer is not bound to execute a void writ, and if it is executed it will be no protection to the officer serving it, or to the plaintiff causing it to be issued. Mathews *v.* Densmore, 43 Mich. 461; Campbell *v.* Webb, 11 Md. 471; Stevenson *v.* McLean, 5 Humph. (Tenn.) 332; Reams *v.* McNail, 9 Huph. (Tenn.) 542.

But the rule that an officer is not bound to execute void process, applies alone to the process in his hands; he is not bound to show that the judgment awarding an execution is void. Perdue *v.* Dodd, 1 Lea (Tenn.) 710.

3. Wales *v.* Clark, 43 Conn. 183; *ante*, § 205.

writ is in his possession he must obey every precept in such writ contained. The court will not direct him in what manner he shall execute it, but he must act on his own responsibility, under the advice of counsel. He must obey without investigating the cause of action, and his knowledge of the facts regarding the same will not affect his duty or liability. After he has made a diligent effort to serve the process and seize the property, as directed, it is his seasonable duty to make a return of the fact on the writ, in his official capacity, and he will be liable for damages occasioned by his neglect to perform any of such duties.[1] The officer is commanded to make the attachment, and when he does so he can not be held responsible for such acts as the law requires of him.[2] He must take the property into his possession and assume dominion over it by such acts as, but for the protection of his writ, would render him liable as a trespasser.[3] He is justifiable in using so much force as is necessary to make the seizure commanded in the writ.[4] He can not break open the outer door of a dwelling-house of the defendant,[5] but, after demanding admission of any one present, he may break open a building not connected with the dwelling-house, for the purpose of making an attachment, without first seeking elsewhere for chattels.[6] And when he has

1. Watson *v.* Watson, 9 Conn. 140; Roth *v.* Duvall, 1 Idaho T. 149; Cody *v.* Quinn, 6 Ired. (N. C.) L. 191; Rust *v.* Pritchett, 5 Harr. (Del.) 260; Bowie *v.* Brahe, 4 Duer (N. Y.) 676; Lovell *v.* Sabin, 15 N. H. 29; Yarborough *v.* Harper, 25 Miss. 112; Green *v.* Lowell, 3 Me. (3 Greenl.) 373.

2. Smith *v.* Orser, 43 Barb. (N. Y.) 187; Battis *v.* Hamlin, 22 Wis. 669.

3. Goode *v.* Longmire, 35 Ala. 668; McBurnie *v.* Overstreet, 8 B. Mon. (Ky.) 300; Rix & Stafford *v.* Silknitter, 57 Iowa 262; Allen *v.* McCalla, 25 Iowa 464; Westervelt *v.* Pinckney, 14 Wend. (N. Y.) 123; Beekman *v.* Lansing, 3 Wend. (N. Y.) 446.

4. Flournoy *v.* Milling, 15 La. Ann. 473.

The oppression of officers in executing process is an indictable offense. Rogers *v.* Brewster, 5 Johns. (N. Y.) 125.

5. Swain *v.* Mizner, 8 Gray (Mass.) 182; Ilsley *v.* Nichols, 12 Pick. (Mass.) 270; Burton *v.* Wilkinson, 18 Vt. 186; State *v.* Whitaker, 107 N. C. 802, 12 S. E. Rep. 456.

It may be otherwise if the goods of a stranger are secreted in a dwelling-house. Burton *v.* Wilkinson, 18 Vt. 186.

6. Clark *v.* Wilson, 14 R. I. 11.

Same principle applies to vaults. Butterfield *v.* Oppenheimer, 18 N. Y. S. 826.

acted diligently and in good faith, and made a reasonable effort to execute the writ, having due regard for his other duties and his instructions from the plaintiff or his attorney, and has not interfered with the property or rights of another than the defendant named therein, he will have discharged his duties and will have incurred no liability whatever.[1] The officer must, however, keep within the pale of his authority and do only that which he is, in due form, commanded to do. He has no right to be wiser than his process, and the instant he undertakes that which he is not commanded to do he becomes a violator of the law and may be proceeded against as such. The law does not give to his pretended official acts such a sanction as to require a citizen to submit to the invasion of personal or property rights.[2]

To insure the faithful performance of official executive duty the law requires the officer to give a bond with sureties, and the officer who, having given such bond, exceeds his official powers and duties, becomes not merely a private trespasser, but for such malfeasance in office he effects a breach of his official bond, and not only renders himself liable therefor, but renders his sureties liable also in an action for damages, not exceeding the penalty named in the bond.[3] The undertaking of the sureties is coextensive with the duties of the sheriff, and although the default of the sheriff—such as a failure to deliver property attached, or to pay the amount of the judgment—oc-

1. Commonwealth for Ashby *v.* Gill, 14 B. Mon. (Ky.) 20; Ford *v.* Dyer, 26 Miss. 243; Harrell *v.* Feagin, 59 Ga. 821; Lyon *v.* Goree, 15 Ala. 360; Tucker *v.* Bradley, 15 Conn. 46.

He is not required to make immediate service unless he has been so instructed, or has knowledge, or reasonable ground to believe that there will be danger of loss to the creditor in delaying the service. He is not guilty of unnecessary delay if he has been engaged in the service of other writs previously delivered to him and completes the same without consuming more time than is necessary for that purpose. Tucker *v.* Bradley, 15 Conn. 46.

2. Wentworth *v.* The People, 4 Scam. (Ill.) 550; Richards *v.* Nye, 5 Ore. 382.

3. Sparkman *v.* Swift, 81 Ala. 231, 8 So. Rep. 160; Harris *v.* Hanson, 11 Me. 241; Archer *v.* Noble, 3 Me. 418; Turner *v.* Killian, 12 Neb. 580; Carmack *v.* Commonwealth, 5 Binn.(Pa.) 184; Sangster *v.* Commonwealth, 17 Gratt. (Va.) 124; Halpin *v.* Hall, 42 Wis. 176.

cur after the expiration of his official term, the sureties upon his bond are liable therefor.[1]

§ 385. **Liability for acts of his deputy.**—It is a general rule of the common law that while officers who exercise *judicial* functions can not perform such acts by a deputy, yet those who act merely in a ministerial capacity may, without any express authority to that effect, perform their official duties by a deputy. Therefore, not only sheriffs but constables may exercise their ministerial functions by another deputed for that purpose. Such deputed person becomes the servant of the officer, and the officer becomes liable for all the acts which he may do "under color of his office." The act of the deputy is considered in law to be the act of the sheriff himself, and the sheriff may be sued for it in "trover" or "trespass" or any other form of action suited to the nature of the case.[2] He is liable for all acts of the deputy for which he would have been liable had he committed such acts himself.[3] The sheriff is liable in his official capacity, and his sureties are on their bond, for all illegal acts of the deputy performed by color of legal process, to the person injured, whether that person be a party to the process or a stranger.[4] An attachment is an official act of the deputy, and the sheriff becomes liable for any misfeasance therein.[5]

The liability of an executive officer for the acts of his deputy extend not only to acts of nonfeasance, but also to acts of misfeasance. It is part of the official duty of a deputy who has

1. Baker *v.* Baldwin, 48 Conn. 131.

2. Jobson *v.* Fennell, 35 Cal. 711; M'Cormick *v.* Miller, 3 Pen & W. (Pa.) 230; Easly *v.* Dye, 14 Ala. 158; Johnson *v.* Edson, 2 Aik. (Vt.) 299; Phillips *v.* Bridge, 11 Mass. 242; Lawrence *v.* Rice, 12 Metc. (Mass.) 527; Tyler *v.* Ulmer, 12 Mass. 163; State *v.* Moore, 19 Mo. 369; Wheeler *v.* McFarland, 10 Wend. (N. Y.) 318.

For mere nonfeasance of a deputy, "trespass on the case" will only lie against the sheriff. The creditor will not be jointly liable with the officer unless he is jointly concerned in the wrongful act, or has ratified and confirmed it after becoming aware of its commission. Abbott *v.* Kimball, 19 Vt. 551.

3. Forsythe *v.* Ellis, 4 J. J. Marsh. (Ky.) 299.

4. Commonwealth *v.* Stockton, 5 T. B. Mon. (Ky.) 192; State *v.* Moore, 19 Mo. 369.

5. Rider *v.* Chick, 59 N. H. 50.

attached property, to keep it in his custody until the suit is determined, whether he continue in office or not, and to deliver it to any proper officer who may seasonably demand it on execution; and for any failure to take the property commanded in the writ, or to keep it safely or to deliver it to the proper person at the termination of the suit either by dismissal or judgment, the sheriff is liable as for his own negligent act.[1] His liability, however, only extends to injury occasioned because of the failure of the deputy to exert ordinary care.[2]

While an attachment plaintiff may waive his right to hold the executive officer liable for any act within the scope of his duty to be performed, yet by simply selecting a person who is by the sheriff appointed to levy the attachment he does not so interfere with the sheriff as to release him from liability for the negligence of such deputy resulting in the destruction of the goods after they have been attached.[3]

A deputy sheriff acts within the scope of his employment when he necessarily engages a keeper to aid him in the safe

1. Lawrence *v.* Rice, 12 Metc. (Mass.) 527; Norton *v.* Nye, 56 Me. 211; Morton *v.* White, 16 Me. 53.

2. Eastman *v.* Judkins, 59 N. H. 576.

Shrubs and trees in a nursery are chattels, and for a conversion of them by a deputy to his own use the sheriff will be liable. Miller *v.* Baker, 1 Metc. 27.

A failure of a deputy to return property legally demanded to satisfy an execution will render the sheriff liable as for a neglect of duty, although neither he nor the deputy be in office at the time of such refusal. The duty extends to the termination of the suit. Morse *v.* Betton, 2 N. H. 184.

The liability of a sheriff for the failure of a deputy to turn over money received upon the sale of perishable goods seized under attachment, only extends to cases in which such deputy has actually received the money. It must be shown affirmatively that the money was actually received by the deputy during the pendency of the attachment suit. Seaver *v.* Pierce, 42 Vt. 325.

Different deputies of the same officer, being co-servants of the same principal, will render such officer liable by the wrongful act of one toward the other when performed under color of process. Therefore, where property was attached by one deputy, and while in his legal custody and possession was attached by a second deputy, the sheriff was liable for the trespass. The precept held by the second deputy should have been placed into the hands of the first, and by him executed. Thompson *v.* Marsh, 14 Mass. 269; Walker *v.* Foxcroft, 2 Me. 270; *ante*, § 201.

3. State *v.* Dalton, 69 Miss. 611, 10 So. Rep. 578.

keeping of the property which he had levied upon under a writ of attachment, and the sheriff is liable for the want of reasonable care on the part of such keeper.[1]

The liability of the officer for the *official* act of the deputy, as above stated, does not extend to his *unofficial* act. The fact that the deputy believed he was acting within his official power, and that the sheriff gave his approval in the same belief, when he was thereafter informed of it, will not render him liable for such act of his deputy;[2] nor will the officer's liability extend to wrongful acts of a deputy which the latter committed as a breach of duty to the former sheriff, even though the act itself be performed while the deputy is the deputy of the present sheriff, *i. e.*, where the deputy refused to surrender property to an execution issued on a judgment on an attachment made in the time of the prior sheriff.[3]

§ 386. **Liability for breach of duty regarding levy—(a) For improper or untimely seizure.**—An officer who undertakes to execute an improper writ, or who improperly executes a proper writ, or who executes a proper writ in a jurisdiction beyond that in which it is enforcible, commits the same wrong as he would have done had he committed the same overt act without the pretended authority of a writ. A tortious taking is a conversion for which trover will lie as well as trespass, and it is also a breach of official duty for which the sureties on the official bond are liable in an action of damages.

1. Foster *v.* Rhinehart, 11 N. Y. S. 629. *Contra*, Welch *v.* Jamison, 1 How. (Miss.) 160.

It is possible for the sheriff to protect himself against the wrongful acts of his deputy by taking from him a bond with surety to "save the sheriff harmless from all judgments, costs and expenses which may at any time happen to him, or to which he may be subjected in any manner in consequence of said appointment;" but such indemnity will not protect the sheriff for a wrongful act of the deputy in making an attachment prior to the making of such bond. Thomas *v.* Blake, 126 Mass. 320.

2. Dorr *v.* Mickley, 16 Minn. 20.

3. Barden *v.* Douglass, 71 Me. 400; Pillsbury *v.* Small, 19 Me. 435.

An action against a sheriff for a wrongful attachment by his deputy is not barred by the fact that an action against the deputy himself for the same cause has been nonsuited. Clapp *v.* Thomas, 5 Allen (Mass.) 158.

The officer and the attaching creditor may be liable for the same cause.[1] The sheriff is, however, not chargeable with irregularities in the attachment proceedings which occur subsequent to the levy.[2]

A sheriff who, on a writ of attachment issuing from a county court, seized property beyond the limits of such county, rendered himself liable in trespass to the owner.[3]

An officer in attaching hay wantonly removed the same in an unfit manner and at an improper season, because of which the hay was injured. This was held to be an abuse of authority, rendering the officer liable in a proper action therefor.[4] But the attachment by the sheriff of a debtor's books containing accounts, in the hands of one to whom accounts had been transferred, and the sending of notice to the debtors thereon of the levy, with a demand to pay to the sheriff as receiver, was held not to constitute a conversion for which the plaintiff would be liable in trover, because there was no interference with the owner's dominion of the property, nor hindrance of his collection of the accounts.[5]

The sheriff and the plaintiff who instigated the attachment are liable to an action for the abuse of process where they willfully seize too much property.[6] But it does not necessarily follow that the officer acts illegally or oppressively simply because he attaches property which is slightly in excess to the amount of the debt, or which is estimated by him to be of greater value than the amount to be attached.[7] And although he willfully takes away more property than he has a right to do, he is not

1. Woodbury *v.* Long, 8 Pick. (Mass.) 543; Patrick *v.* Solinger, 9 Daly (N. Y.) 149; Weston *v.* Dorr, 25 Me. 176; Jones *v.* Buzzard, 2 Ark. 415; Barrett *v.* White, 3 N. H. 210; Shuff *v.* Morgan, 9 Martin (La.) 592; Parmlee *v.* Leonard, 9 Iowa 131; Lyle *v.* Barker, 5 Binn. (Pa.) 457.

2. Grady *v.* Bowe, 11 Daly (N. Y.) 259.

3. Parmlee *v.* Leonard, 9 Iowa 131.

4. Barrett *v.* White, 3 N. H. 210.

5. Kreher *v.* Mason, 33 Mo. App. 297.

6. Hilliard *v.* Wilson, 65 Tex. 286.

The action may be brought in the county where the sheriff resides, without regard to the place of residence of his principals. Hilliard *v.* Wilson, 65 Tex. 286.

7. Merrill *v.* Curtis, 18 Me. 272; Blum *v.* Strong, 71 Tex. 321, 6 S.W. Rep. 167.

a trespasser *ab initio* as to the whole, but only as to the excess beyond that which he may lawfully take.[1]

A valid levy can not be effected by fraud, although the levy in itself may appear to be legal. Where a debtor was fraudulently induced to remove property from the place of his residence, where it was exempt from attachment, and to bring it into a jurisdiction where it was not so exempt, where it was then attached, the officer was held liable as a trespasser, although he did not know of the fraud and simply obeyed the terms of his precept.[2]

The personal rights of the debtor must be respected in all cases, and, if a custodian is necessary, such custodian must be a proper person for the discharge of that duty, for, where an unfit person was placed as keeper over goods against the remonstrance of the owner, the sheriff was held as a trespasser *ab initio*.[3]

A levy proper in itself may be rendered improper because of another existing levy having formerly been made upon the same property. In such a case, if the second levy is not made in subordination to the first, and by the same officer, the last attaching officer will become liable to the officer or keeper holding the custody of the property by virtue of the first attachment.[4]

Not affected by knowledge.—The officer, when he acts in a legal manner, is not rendered liable because of his knowledge that the plaintiff sued out the attachment with a malicious intent to injure the defendant by a seizure and detention of his property, but the attachment must be valid and the property seized must be legally subject to attachment.[5] The officer is

1. Wentworth *v.* Sawyer, 76 Me. 434.

2. Deyo *v.* Jennison, 10 Allen (Mass.) 410.

3. Malcom *v.* Spoor, 12 Metc. (Mass.) 279.

4. Scarborough *v.* Malone, 67 Ala. 570; Fellows *v.* Wadsworth, 62 N. H. 26.

It is always competent to show in evidence, on the part of the plaintiff in an action against an officer, the motives and conduct of the officer or his deputy at the precise time of making the attachment, in order that it may be known whether or not he acted unlawfully. Moulton *v.* Chadborne, 31 Me. 152.

5. Wakefield *v.* Fairman, 41 Vt. 339; Rice *v.* Miller, 70 Tex. 613, 8 S.

justified in all cases where his writ is apparently sufficient and the proceedings are free from such gross irregularities as to affect the jurisdiction, although there might be sufficient grounds for reversal by suitable proceeding in a tribunal having authority to review them.[1]

No liability without seizure.—Before the officer is rendered liable for wrongful attachment there must be a seizure in fact. There is no conversion unless the property has in some way been subjected to the control of the officer. His act must have been such as would render him a trespasser were it not for the process which he holds.[2]

The officer having rendered himself liable in trespass by a defective service can not defeat the action by making a proper service under a new writ;[3] nor by subsequent application by sale under execution in favor of the attachment plaintiff.[4]

However, negligence on the part of the person claiming to be injured, when the same contributed to the result complained

W. Rep. 317; Watson *v.* Watson, 9 Conn. 140; Roth *v.* Duvall, 1 Idaho T. 149; Cody *v.* Quinn, 6 Ired. (N. C.) L. 191.

1. Winchell *v.* McKinzie, 35 Neb. 813, 53 N. W. Rep. 975; Levi *v.* Darling, 28 Ind. 497; Stewart *v.* Martin, 16 Vt. 397; Day *v.* Bach, 87 N. Y. 56; Archibald *v.* Thompson, 2 Colo. T. 388; Garnet *v.* Wimp, 3 B. Mon. (Ky.) 360; Matthews *v.* Densmore, 109 U. S. 216; Livingston *v.* Miller, 48 Hun (N. Y.) 232.

It is no justification to the officer, however, to show an attachment under a writ otherwise sufficient if it issued under an unconstitutional law. Warren *v.* Kelley, 80 Me. 512, 15 Atl. Rep. 49.

Pleading and evidence.—Under a plea of the general issue the officer may rely on any matter of *justification*, and in proof of his cause, even though it be parol. Briggs *v.* Mason, 31 Vt. 433.

Under a plea of justification it is for the officer to show the attachment and all the proceedings under it. McBrayer *v.* Dillard, 49 Ala. 174. See *post*, § 399, "Defenses Against Third Persons."

2. Yale *v.* Saunders, 16 Vt. 243; Morse *v.* Hurd, 17 N. H. 246; Camp *v.* Chamberlain, 5 Denio (N. Y.) 198; Molm *v.* Barton, 27 Minn. 530.

Attaching piles of wood by marking the same, leaving a keeper in charge and making a proper return thereof, is an exercise of such dominion over the property to the exclusion of the lawful owner as to constitute a conversion when the attachment is unauthorized. Molm *v.* Barton, 27 Minn. 530.

And to render the officer a trespasser *ab initio* it is necessary that the wrongful act be done to the property itself and not to the fund realized from a legal sale thereof. Bentley *v.* White, 54 Vt. 564.

3. Lick *v.* Madden, 36 Cal. 208.

4. Fairbanks *v.* Bennett, 52 Mich. 61.

of, will defeat a recovery against the officer, notwithstanding the mal-conduct of the officer would have otherwise sustained an action for damages.[1]

Parties to an action.—The officer may be alone made a party defendant, or he may be joined with the attachment plaintiff when the latter has advised, aided, abetted, or approved of the wrongful acts which caused the injury. The sureties on his official bond may also be joined with the officer in a proper form of action for his malfeasance in office; and not only they, but in Texas, the sureties on an indemnity bond given him in the attachment suit may as well be made parties defendant in an action against the officer for a wrongful levy of the writ.[2]

In Texas, also, the attaching creditor who has indemnified the officer may defend in the name of such officer, but he has no right to intervene and be made a party to the record.[3] The party who has sustained the injury is the proper party plaintiff in an action against the executive officer, and it is said that even a foreign administrator, he having given ample bonds, may sue for property of his intestate fraudulently brought into the state where the attachment was made.[4]

Form of action.—For an *abuse* of an attachment process the proper form of action is "trespass on the case." "Trespass *vi et armis*" can not be maintained for an injury committed under process of law unless the process was void or has been annulled. In "trespass" the *force* is the gist of the action, and when that is justified by the process, the motive is rendered immaterial.[5] Trover may also be sustained where the acts complained of constitute a conversion, and where money is held under an invalid attachment the same may be recovered from the attaching officer in an action of *assumpsit* "for money had and received."[6]

1. Otis *v.* Jones, 21 Wend. (N. Y.) 394.

It will be otherwise in Illinois and Georgia, where the rule of contributory negligence obtains.

2. Cabell *v.* Hamilton Brown Shoe Co., 81 Tex. 104, 16 S. W. Rep. 811.

3. McKee *v.* Coffin, 66 Tex. 304, 1 S. W. Rep. 276.

4. Wingate *v.* Wheat, 6 La. Ann. 238.

5. Lovier *v.* Gilpin, 6 Dana (Ky.) 321; Owens *v.* Starr, 2 Littell (Ky.) 230; Banta *v.* Reynolds, 3 B. Mon. (Ky.) 80.

6. Allen *v.* Wright, 134 Mass. 347.

§ 387. (b) **For seizure under writ against third party.**—A writ of attachment only gives to the officer authority to seize the property of the person against whom it is issued. And if he seize the property of any other person than the defendant named therein he becomes liable to the same extent as any other person would by doing such act without a legal process. Such a seizure is *prima facie* wrongful. The officer becomes a trespasser *ab initio* and is answerable for the consequences of his unlawful entry and seizure.[1] When an officer is about to attach property in the apparent possession of one other than the defendant named in the writ, he must make inquiry concerning the ownership of such person for information, and must observe that which is given to him, but he is not bound to inquire beyond the person in whose apparent possession he finds the property.[2]

The sheriff becomes liable to a third person whose property he takes on a writ of attachment running against another, in an action of trespass or of trover without previous demand, even though such goods were seized by mistake.[3] He is also liable to an action of replevin, by which the owner may recover the goods themselves from the officer who has so wrongfully taken them.[4]

Liable on his bond.—The sheriff not only renders himself

1. Rhodes *v.* Patterson, 3 Cal. 469; Bodega *v.* Perkerson, 60 Ga. 516; Edwards *v.* Turner, 6 Rob. (La.) 382; Tufts *v.* McClintock, 28 Me. 424; Weston *v.* Dorr, 25 Me. 176; Kelley *v.* Swift, 127 Mass. 187; Stickney *v.* Davis, 16 Pick. (Mass.) 19; Walcot *v.* Pomeroy, 2 Pick. (Mass.) 121; Malcom *v.* Spoor, 12 Metc. 279; Miller *v.* Baker, 1 Metc. (Mass.) 27; Caldwell *v.* Arnold, 8 Minn. 265; Ford *v.* Dyer, 26 Miss. 243; State *v.* Hope, 88 Mo. 430; Grunberg *v.* Grant, (Com. Pl. N. Y.) 22 N. Y. S. 747, 3 Misc. Rep. 230.

Unless the owner has so conducted himself in reference to the property as to have forfeited his legal rights therein. Tufts *v.* McClintock, 28 Me. 424.

2. Hildreth *v.* Fitts, 53 Vt. 684; Harris *v.* Tenney, 85 Tex. 254, 20 S. W. Rep. 82; Upton *v.* Graig, 57 Ill. 257; Rand *v.* Sargent, 23 Me. 326.

3. Boulware *v.* Craddock, 30 Cal. 190; Ledley *v.* Hays, 1 Cal. 160; Meade *v.* Smith, 16 Conn. 346; Jamison *v.* Hendricks, 2 Blackf. (Ind.) 94; Phillips *v.* Hall, 8 Wend. (N. Y.) 610; Johnson *v.* Edson, 2 Aik. (Vt.) 299.

4. Deutsch *v.* Reilly, 8 Daly (N. Y.) 132; Gimble *v.* Ackley, 12 Iowa 27; Smith *v.* Montgomery, 5 Iowa 370; Miller *v.* Bryan, 3 Iowa 58; Wilson *v.* Stripe, 4 G. Greene (Iowa) 551.

liable as a trespasser when he takes the goods of a person not named in the writ as defendant, but such taking is a malfeasance in office, constituting a breach of his bond given for the "faithful performance of the duty of his office," and therefore renders his sureties on such bond liable to an action for damages because of the injury sustained.[1]

Common law action or intervention.—The cause of action arises as soon as the act is done, and the injured owner may bring his common-law action therefor. Although the statute may provide for a statutory intervention to have his rights determined in the attachment suit, yet there is no necessity that he should await the determination of such suit to have redress for the wrong.[2] He may, however, find it necessary to take action before the determination of the attachment suit, for the statute providing for his intervention may cause his neglect so to do to be a bar to his objections in the future, provided he have notice of and an opportunity to intervene in the attachment suit. But under a Maryland statute the fact that he had so intervened and recovered judgment for the restitution of the property did not waive his right thereafter to maintain trespass for the illegal taking and detention.[3]

Return no justification.—Since the injuries occasioned arise immediately upon the tortious taking, it follows that a return

1. Harris *v.* Hanson, 11 Me. 241; Archer *v.* Noble, 3 Me. 418; Van Pelt *v.* Littler, 14 Cal. 194; State *v.* Fitzpatrick, 64 Mo. 185; Sangster *v.* Commonwealth, 17 Gratt. (Va.) 124.

Pleading.—In an action by such third person the averment of ownership is sufficient to sustain a judgment when it alleges that the goods were taken from the plaintiff, and the defendants knew that they belonged to him, and when no objections to such averment are raised by the defendants. Tillman *v.* Fletcher, 78 Tex. 673, 15 S. W. Rep. 161.

2. Richardson *v.* Hall, 21 Md. 399; Lesher *v.* Getman, 30 Minn. 321.

3. Trieber *v.* Blocher, 10 Md. 14.

When goods have been wrongfully attached in the hands of one other than the attachment defendant, though such one be another than the owner, the owner must bring his action against the attaching officer and not against the one in whose possession the property was at the time of the attachment. Stiles *v.* Davis, 1 Black (U. S.) 101.

An action against the officer for a wrongful taking can not be maintained except by one who proves that he had actual or constructive possession of the chattels at the time of the attachment, and also a general or qualified property in them. Brainard *v.* Burton, 5 Vt. 97.

of the property to and an acceptance of it by the owner, or the delivery of it to a receiver, in accordance with an order of court, will not release the attaching officer from his liability for such wrongful taking, the return and acceptance being only available in mitigation of damages in a suit therefor.[1]

It is the levy that creates the liability.—In order to charge the officer for levying upon the wrong property it must appear that the writ was served by him or with his knowledge.[2] But manual occupation, touching or removal of goods, is not essential to constitute such wrongful taking as will subject a sheriff to an action of trespass for attaching the property of a stranger. The return of the writ that the goods were "attached" is sufficient.[3]

Property owned by tenants in common, or partners, can not generally be seized on an attachment against one of them and taken into the officer's possession to the exclusion of the other.[4] The officer must levy upon and sell the undivided moiety of the debtor in the property, and not upon specific chattels as though belonging to the defendant exclusively. He can not make a division of it, and if he undertakes to seize the whole, or thereafter sells the whole, it is an abuse of his authority, making him a trespasser *ab initio* and liable to the other part owner, either in trespass or trover.[5]

1. Hanmer *v.* Wilsey, 17 Wend. (N. Y.) 91; Wise *v.* Jefferis, 51 Fed. Rep. 641, 2 Cir. Ct. App. 432, 7 U. S. App. 275.

2. Tower *v.* Wilson, 3 Cai. (N. Y.) 174 b.

3. Paxton *v.* Steckel, 2 Pa. St. 93; St. George *v.* O'Connell, 110 Mass. 475.

An officer with a writ told the owner of goods, which were in sight, that he had attached them. He forbade the owner to remove them until the debt upon which the writ issued should be paid. This was a constructive taking and sufficient evidence of a conversion. St. George *v.* O'Connell, 110 Mass. 475.

4. *Ante*, § 49.

5. Blevins *v.* Baker, 11 Ired. (N. C.) L. 291; Ladd *v.* Hill, 4 Vt. 164; White *v.* Morton, 22 Vt. 15; Haynes *v.* Knowles, 36 Mich. 407; Bernal *v.* Hovious, 17 Cal. 541; Cook *v.* Potts, 59 Tenn. (3 Bax.) 227; Veach *v.* Adams, 51 Cal. 609; Melville *v.* Brown, 15 Mass. 82.

But an action can not be maintained against the officer for a tortious conversion of the whole when he seized it under an attachment against one having an interest therein. His act was only a conversion of the moiety which he had no right to seize. Beezley *v.* Crossen, 16 Ore. 72, 17 Pac. Rep. 577.

Liability to mortgagee.—An officer may levy upon mortgaged chattels in the manner prescribed by law,[1] but where he does not pay or tender to the mortgagee, or deposit for him in the county treasurer's office (when so required), the amount of the mortgaged debt, he is liable, as for a conversion to the mortgagee for such wrongful seizure to the value of the mortgaged debt or for the value of the property when the same is less than the mortgaged debt.[2]

The plaintiff in an action against the officer for wrongful attachment of mortgaged property can in no case recover more than his interest in the property attached and sold thereunder.[3]

May be repelled by force.—The owner of personal property, or person having a qualified interest therein and possession thereof, when not named in the writ as defendant may make use of any peaceable means to prevent its attachment as the property of another, or to retain possession of it when it can be done without personal violence to the officer.[4] An officer

1. See *ante*, § 212.

2. Rocheleau *v.* Boyle, 12 Mont. 590, 31 Pac. Rep. 533; Irwin *v.* McDowell, 91 Cal. 119, 27 Pac. Rep. 601; Stearns *v.* Dean, 129 Mass. 139.

If the sheriff have notice that the property is mortgaged it is sufficient to put him on inquiry, although he do not know when the mortgage was given, and such notice has been held to sustain a finding of actual notice of the mortgage. Coleman *v.* Reel, 75 Iowa 304, 39 N. W. Rep. 510.

But he is not liable to a subsequent mortgagee when a receiver duly appointed by the court from which the attachment issued, takes exclusive control of the case, sells them and receives the proceeds. Smith-Frazer Boot and Shoe Co. *v.* Ware, 47 Kan. 483, 28 Pac. Rep. 159.

Evidence.—When an action for wrongful attachment and sale of mortgaged property is brought against a sheriff and his sureties, evidence *aliunde* the sheriff's return of the attachment is admissible to identify the goods as those described in the mortgage. Crawford *v.* Nolan, 72 Iowa 673, 34 N. W. Rep. 754.

Replevin may be sustained against a sheriff who levies an attachment upon mortgaged goods where there is no pretense that the mortgage was paid at the time of the attachment, although it may appear that the mortgage has since been paid. Rosenfield *v.* Case, 87 Mich. 295, 49 N. W. Rep. 630.

3. Becker *v.* Dunham, 27 Minn. 32.

4. State *v.* Miller, 12 Vt. 437.

A statute in Maine requires a mortgagee to "deliver to the officer a true account of the amount due him" when the officer attaches the mortgaged property, and a delivery of such account to the attaching creditor will not satisfy the statute; nor will a statement that "it is impossible for me to know the amount of my mortgagor's claim, but if I am correct, it is

who enters a house, store or a building of a stranger to the writ for the purpose of attaching goods therein is liable as a trespasser *ab initio* unless he proceeds with all reasonable speed and without delay to perfect the attachment in the manner required by law. If he does so proceed he is protected by his writ.[1]

When goods intermixed.—An officer when attaching chattels intermixed with those of a stranger will be guilty of trespass if he attaches more than those pointed out to him as the property of the defendant, or if, when unable to identify the goods of the defendant, he makes a levy on goods in sight without requesting the possessor to point out the goods of the defendant; but after such request and a refusal thereof he will be justified in attaching the whole if he can not identify the goods of the debtor.[2]

somewhere about $2,300." Phillips *v.* Fields, 83 Me. 348, 22 Atl. Rep. 243.

Likewise a vendor on a conditional sale must notify the officer of his claim and the amount due upon it before he can maintain replevin against the attaching officer. Gross *v.* Jordan, 83 Me. 380, 22 Atl. Rep. 250.

1. Rowley *v.* Rice, 11 Metc. 337; Davis *v.* Stone, 120 Mass. 228; Perry *v.* Carr, 42 Vt. 50; Cook *v.* Hopper, 23 Mich. 511; Bishop *v.* Warner, 19 Conn. 460.

2. Treat *v.* Barber, 7 Conn. 274: Sibley *v.* Brown, 15 Me. 185; Bond *v.* Ward, 7 Mass. 123; Morrill *v.* Keyes, 14 Allen (Mass.) 222; Smith *v.* Sanborn, 6 Gray (Mass.) 134; Shumway *v.* Rutter, 8 Pick. (Mass.) 443. See Chesterfield Manuf. Co. *v.* Dehon, 5 Pick. (Mass.) 7; Denston *v.* Perkins, 2 Pick. (Mass.)86; Thompson*v.*Perkins, 3 Mason (C. C.) 232; Sawyer *v.* Merrill, 6 Pick. (Mass.) 478; Smokey *v.* Peters & Calhoun Co., 66 Miss. 471, 5 So. Rep. 632; Taylor *v.* Jones, 42 N. H. 25; Robinson *v.* Holt, 39 N. H. 557; Gilman *v.* Hill, 36 N. H. 311; Wilson *v.* Lane, 33 N. H. 466; Albee *v.* Webster, 16 N. H. 362; Holbrook *v.* Hyde, 1 Vt. 286; *ante*, § 210.

But an officer is not so justified in attaching property when the stranger has not unlawfully intermixed it, but has done so for the purpose of using it to a better advantage, Sibley *v.* Brown, 15 Me. 185; nor where the stranger is unable to point out the goods desired, Davis *v.* Stone, 120 Mass. 228; nor when the mixture is of such a nature that they can not be successfully separated where the mixing was not fraudulent. Allen *v.* Kirk, 81 Iowa 658, 47 N. W. Rep. 906.

An *estoppel* is effected where one points out goods to the sheriff as the property of the defendant. Such person can not thereafter claim an ownership in the property at the time. Chapman *v.* O'Brien, 34 N. Y. Sup. Ct. (2 J. & S.) 524. But where goods of a stranger are attached and thereafter returned to him on his receipt, he is not thereby estopped from maintaining an action against the officer for the wrongful taking. Robinson *v.* Mansfield, 13 Pick. (Mass.) 139.

The owner of a store in which the

On second levy.—An officer attaching goods which are already held by another officer on an attachment becomes liable therefor to the first attaching officer, but not to the owner of the property. The property being in custody of law the rights of the owner are not interfered with by the attachment.[1]

§ 388. (c) **For seizure of exempt property.**—The seizure of goods, which are, by law, exempt from attachment by an officer, especially where his writ does not direct the attachment of any particular property, renders the officer liable as a trespasser;[2] unless it was attached by the consent of the owner, tacitly or otherwise expressed;[3] or unless, after being requested

goods of another are attached, and the store also retained in the possession of the officer, can not recover from the officer the value of the use of such store, when he might have retained possession of both store and goods by receipting to the officer therefor. Charles City Plow and Man. Co. *v.* Jones, 71 Iowa 234, 32 N. W. Rep. 280.

1. Foulks *v.* Pegg, 6 Nev. 136; Ginsberg *v.* Pohl, 35 Md. 505; Luce *v.* Hoisington, 54 Vt. 428; Benson *v.* Berry, 55 Barb. (N. Y.) 620.

Where, however, an officer holding property wrongfully attached, attaches it wrongfully, at suit of another creditor, he is liable in trespass jointly with the second attaching creditor. Cox *v.* Hall, 18 Vt. 191.

But where an officer holding chattels wrongfully attaches them under a second writ and only keeps the chattels from the owner while so entitled under the first writ, he is not liable as a trespasser on the second writ. Luce *v.* Hoisington, 54 Vt. 428.

Furthermore, where an officer wrongfully holds possession on attachment under writs of different creditors, a release by the owner of all claim to damages in consequence of the second attachment in consideration that it be released, has no effect upon a suit to recover the damages occasioned by the first taking. Weston *v.* Dorr, 25 Me. 176.

2. Meadow *v.* Wise, 41 Ark. 285; Foss *v.* Stewart, 14 Me. 312; Kiff *v.* Old Colony, etc., R. R. Co., 117 Mass. 591; Gibson *v.* Jenney, 15 Mass. 205; Bean *v.* Hubbard, 4 Cush. (Mass.) 85.

3. Cilley *v.* Jenness, 2 N. H. 87; Lynd *v.* Picket, 7 Minn. 184.

A neglect to claim a right of exemption may become a waiver thereof. Lynd *v.* Picket, 7 Minn. 184; *ante*, §§ 84 and 85.

But no express claim of exemption is necessary where, because of the statute designating certain articles or animals as exempt, the officer has reason to know the exempt character of the property on which he levies. *Ante*, § 210.

For example, the attachment of a whole flock of sheep without leaving the defendant the number exempted by law. Frost *v.* Mott, 34 N. Y. 253.

Or taking the defendant's only cow when a cow is exempt. Howard *v.* Farr, 18 N. H. 457.

But the attachment defendant must make it appear in his action against

to indicate exempt property confused with other property, the defendant refuses so to do.[1]

The owner of exempt property, which has been attached, may recover the same in an action of "replevin,"[2] or he may have an action of "trover" therefor, but if he has sustained no actual injury he can recover no more than merely nominal damages.[3]

For the attachment of exempt property the sheriff is not only individually liable, but his official bondsmen are liable for the damages occasioned by his wrongful act, not to exceed the amount named in the official bond.[4]

The officer may seize and hold exempt property of the debtor for a sufficient time to make an inventory and appraisal of them, and in so doing will not commit a trespass.[5] The rule is the same as that applied to the retention of a stranger's property for a like purpose.[6]

§ 389. (d) **For seizure of property in custody of law.**— Chattels in custody of law, being exempt from attachment, except by an officer having the legal custody of them,[7] an officer

the officer that there was not enough property levied to satisfy the requirements of the statute, or that he had but one cow and she was taken by the officer. Howard *v.* Farr, 18 N. H. 457; Gay *v.* Southworth, 113 Mass. 333.

1. Towns *v.* Pratt, 33 N. H. 345; Smith *v.* Chadwick, 51 Me. 515.

Where a traveling trunk, cabinet box and breast-pin are not exempt, as wearing apparel, a trunk containing articles of wearing apparel was properly attached by an officer after giving the debtor opportunity to remove the exempt articles, the debtor declining so to do. The officer properly retained the exempt articles until called for and then delivered them. An action for the wrongful taking was dismissed. Towns *v.* Pratt, 33 N. H. 345.

Property which might not otherwise be exempt from attachment, may be unattachable without committing a trespass by being connected to the defendant's person. For example, a watch connected with the person of the debtor by a cord can not be attached, although it be in the hands of the officer himself. Mack *v.* Parks, 8 Gray (Mass.) 517.

2. Hoisington *v.* Armstrong, 22 Kan. 110.

3. Cooper *v.* Newman, 45 N. H. 339.

4. Mace *v.* Gaddis, 3 Wash. T. 125, 13 Pac. Rep. 545.

5. Bonnel *v.* Dunn, 29 N. J. L. (5 Dutch) 435.

6. *Ante*, § 387.

7. *Ante*, § 46.

other than the one having such custody, will render himself liable as a trespasser *ab initio* who seizes them on a writ of attachment. But he will be liable at suit of the officer having their custody instead of at suit of the owner, for the owner's rights are not damages unless the injury extends beyond the period during which the property is in the legal custody of the first officer.[1]

§ 390. (e) **For failure to levy as directed.**—When a writ is placed into the hands of an officer with instructions that he serve the same, he is liable to the plaintiff for any damage which he may cause by his neglect to attach enough of the property of the named defendant to secure the debt.[2] The officer must execute a writ, and may attach an article of much greater value than the amount named in the writ without waiting to see whether another article, nearer the amount of the claim and value, may be attached.[3] But he is not excused in making an insufficient levy because of his failure to allow for depreciation in the value of goods when disposed of at a forced sale.[4]

1. Foulks *v.* Pegg, 6 Nev. 136; Ginsberg *v.* Pohl, 35 Md. 505; Luce *v.* Hoisington, 54 Vt. 428; Cox *v.* Hall, 18 Vt. 191.

2. Townsend *v.* Libbey, 70 Me. 162; Moulton *v.* Chadborne, 31 Me. 152; Smith *v.* Judkins, 60 N. H. 127; Kuhlman *v.* Orser, 5 Duer (N. Y.) 242; Ransom *v.* Halcott, 18 Barb. (N. Y.) 56; Flinn *v.* St. John, 51 Vt. 334; Hill *v.* Pratt, 29 Vt. 119.

When particularly directed to make the attachment he is liable for a failure to do so, although he refrain in good faith, fearing to drive the defendant to insolvency. Smith *v.* Judkins, 60 N. H. 127.

In making an attachment the sheriff acts as much at his own peril in applying the process of the attachment described as he would in proceeding under a final execution. Kuhlman *v.* Orser, 5 Duer (N. Y.) 242.

Nor is his liability discharged by the fact that a second attachment was brought by the plaintiff against the same defendant. But a neglect of the plaintiff to prosecute the second suit to a successful termination may be brought to the attention of the jury. Flinn *v.* St. John, 51 Vt. 334.

The officer, when directed to attach personal property, can not excuse himself by attaching real property, although the same be owned by the debtor. Moulton *v.* Chadborne, 31 Me. 152.

3. Moulton *v.* Chadborne, 31 Me. 152.

4. Dewitt *v.* Oppenheimer, 51 Tex. 103. Compare Atcheson *v.* Hutchison, 51 Tex. 223.

But where the amount named in the

When no special directions are given, the officer will be held to obey the general demand of the precept by attaching sufficient to satisfy the claim, but when special instructions are endorsed upon the writ he must follow them, and when subsequent oral instructions are given he is bound to obey the latter.[1]

When an officer receives a writ with special instructions he must follow such instructions literally, or his only excuse for not doing so will be by showing that he could not do so lawfully. If he fears to incur a liability from the person in whose possession the property is, he must demand indemnity from the plaintiff, for failing to make such demand and failing to make the attachment he can not excuse himself by such belief.[2]

The liability of the officer for neglecting to remove the goods attached is the same as for a neglect to make the levy. If his neglect to remove them results in his attaching creditor losing his lien by the subsequent attachment of other creditors, or by any other means, the officer and his sureties are liable to the plaintiff for his damages.[3]

writ is, by mistake, stated to be less than that demanded in the affidavit for attachment, the officer will be released from liability when he attaches sufficient to bring the amount named in the writ with costs. Page *v.* Belt, 17 Mo. 263.

1. Turner *v.* Austin, 16 Mass. 181; Marshall *v.* Hosmer, 4 Mass. 60; Almy *v.* Wolcott, 13 Mass. 73.

When instructed to attach specific property he need not attach any other, but if he does so he can not thereafter release it. Turner *v.* Austin, 16 Mass. 181.

A court order directing the sheriff to open a safe and tin box containing the property and securities of the defendant, on deposit with a trust company, and to take therefrom and safely keep the property and evidences of debt, liable to attachment, found therein, it is not improper. U. S. *v.* Graff, 67 Barb. (N. Y.) 304.

2. Bond *v.* Ward, 7 Mass. 123; Perkins *v.* Pitman, 34 N. H. 261; Ranlett *v.* Blodgett, 17 N. H. 298; West River Bank *v.* Gorham, 38 Vt. 649; Lavretta *v.* Holcombe, 98 Ala. 503, 12 So. Rep. 789; Long *v.* Neville, 36 Cal. 455; Davidson *v.* Dallas, 8 Cal. 227; Smith *v.* Cicotte, 11 Mich. 383; Marsh *v.* Gold, 2 Pick. (Mass.) 285; Perley *v.* Foster, 9 Mass. 112, 114; Spangler *v.* Commonwealth, 16 Serg. & R. (Pa.) 68. As to when officer may require bond of indemnity, see *ante*, § 203; Knight *v.* Nelson, 117 Mass. 458.

It was said in one case that by giving particular directions for the manner of service, an implied promise of indemnity was made. Ranlett *v.* Blodgett, 17 N. H. 298.

3. Gale *v.* Ward, 14 Mass. 352.

Officer must be proceeded against by action and not by rule. The officer must generally be proceeded against by a direct action, and not merely by

§ 391. **Liability for breach of duty regarding return.**—It is the duty of the officer to make a proper return into court upon the writ of the attachment served by him. If he does not do this, or if he does not do it properly, he will be liable to the person thereby injured. If he fails to make a return he will be liable in an action on the case for the neglect.[1] He can not justify himself in an action of trespass by a writ which he has not returned, and if his return does not speak truly he will be

a rule to show cause why he did not execute the attachment. The circuit court of common pleas of South Carolina has no jurisdiction to attach a sheriff for contempt upon a rule to show cause issued by a magistrate; and a sheriff was discharged therefrom under a *habeas corpus* by a justice of the supreme court. James *v.* Smith, 2 S. C. 183.

Pleading.—In an action against a sheriff for negligence in levying an attachment, a cause of action was stated in the plaintiff's pleading which averred that the attachment was placed in the sheriff's hands with instructions to levy at once on certain real estate of the debtor; that the sheriff negligently failed to make such levy until after several judgments had been obtained against the debtor; that executions were issued on these judgments, and levied upon said real estate, which was sold and bid in by the judgment creditors; and that it was necessary for the plaintiff to buy the certificates of purchase issued to the judgment creditors, which he did to their face value. People *v.* Cramer, 15 Colo. 155, 25 Pac. Rep. 302.

Proof.—In an action against the sheriff for failure to make a levy, the burden rests upon the plaintiff to prove that he has suffered damages by the negligence of such officer. Wolfe *v.* Dorr, 24 Me. 104.

The judgment obtained by the plaintiff in his main action against the defendant which has not been collected is *prima facie* evidence of the injury sustained without making proof of the indebtedness on which the judgment was founded. Donnell *v.* Jones, 13 Ala. 490.

After it is made to appear that the attachment issued and that there is property in the possession of the defendant (*prima facie*) that might be a subject of levy, and that the same was pointed out to the sheriff, it is then competent for the sheriff to prove that the property was not subject to attachment. He may do this, even though an indemnifying bond was given. Mathis *v.* Carpenter, 95 Ala. 156, 10 So. Rep. 341.

It is an undisputed rule of evidence that when an officer is sued for not levying upon or removing property of the debtor, he may justify himself by showing that such property belonged to a person other than the debtor. Fuller *v.* Holden, 4 Mass. 498; Canada *v.* Southwick, 16 Pick. (Mass.) 556; West *v.* Meserve, 17 N. H. 432.

The officer is not protected by showing that his writ was irregular when the same is not absolutely void. Stevenson *v.* McLean, 5 Humph. (Tenn.) 332.

1. But he may always show that the controversy was settled, the property returned to the owner and he himself instructed not to return the writ. Paine *v.* Farr, 118 Mass. 74.

liable as for a false return.[1] A proper return being an official duty, a failure therein will render the sureties of the officer as well as himself liable in an action of damages therefor.[2]

The return is one of the necessary steps to a valid attachment, and if it be omitted the property will be discharged from the lien and trover or replevin will lie therefor.[3] The officer (and sureties) will then, of course, be liable to the plaintiff for a breach of duty. It seems, however, that where the plaintiff makes a settlement of his claim for a certain sum in cash he thereby precludes himself from maintaining an action against the sheriff for a false return.[4]

The omission of a statement of certain facts from a return does not make a return false, if the facts which are stated be true.[5] But an attachment, wrongful because of improper re-

1. Bickerstaff *v.* Patterson, 8 Port. (Ala.) 245; Bowen *v.* Parkhurst, 24 Ill. 257; Franklin Bank *v.* Small, 26 Me. 136; French *v.* Stanley, 21 Me. 512; Williams *v.* Babbitt, 14 Gray (Mass.) 141; Magne *v.* Seymour, 5 Wend. (N. Y.) 309; Howes *v.* Spicer, 23 Vt. 508.

An attachment which is abandoned immediately becomes a nullity, and a return stating that such an attachment has been made is a false return. French *v.* Stanley, 21 Me. 512.

Where a sheriff, deeming the title in the property attached to be uncertain, calls a jury, satisfies himself that the title is not in the defendant, he may refuse to deliver the goods to the claimant, and returns the writ *nulla bona*, but he assumes the responsibility of proving that such is the fact in case an action is brought against him for a false return. Batchellor *v.* Schuyler, 3 Hill (N. Y.) 386; Magne *v.* Seymour, 5 Wend. (N. Y.) 309.

When he has returned a writ *nulla bona* and is sued for a false return, he may always prove that the property in question was not the property of the attachment debtor, notwithstanding he may not have demanded a bond of indemnity from the plaintiffs. Blair *v.* Flack, 17 N. Y. S. 64, 62 Hun 509.

2. Shaw *v.* Holmes, 4 Heisk. (Tenn.) 692; Blair *v.* Flack, 17 N. Y. S. 64, 62 Hun 509.

The fact that a sheriff releases property on which he has made a levy, simply because the plaintiff does not indemnify him, when he is thereafter informed of an adverse claim and demands such indemnity, makes a return by him *nulla bona* a false return, and he becomes liable therefor. An officer has no right to release an attachment because no indemnity is given him. He should demand the indemnity before the making of the attachment. Shaw *v.* Holmes, 4 Heisk. (Tenn.) 692. *Ante*, § 203.

3. Owen *v.* Dixon, 17 Conn. 492.

4. Wright *v.* Darlington, 108 Pa. St. 372.

5. Tarleton *v.* Gibson, 2 Ala. 638.

A return of an attachment on land need only describe the premises with

turn, can not be justified by the writ and proceedings thereunder.[1]

The failure to return a writ of attachment raises a presumption of liability against the sheriff, and, if the defendant have sufficient property to satisfy the plaintiff's demands, the sheriff's presumed liability will be measured by such demand.[2] But where the sheriff does all he can be reasonably required to do to make a proper return of the writ into court, he can not be held for a neglect of duty where the clerk of the court, by his servant or a member of his family, negligently omits to enter the same on the docket of the court.[3]

The return of the officer is generally only *prima facie* evidence in actions by or against him.[4] It is only such in actions brought by the vendee of the property or another officer making a subsequent attachment of it.[5] But where the vendee purchases with notice of the attachment, the return of the officer that he attached the goods is conclusive.[6] Where the return is, by a person's conduct toward the officer, admitted to be true, he can not thereafter dispute the return as against such officer.[7] It is not conclusive, as against him, when sued for a false return. He may show that it was the property of a third

such certainty as would be necessary in a deed. Howard *v.* Daniels, 2 N. H. 137; *ante* § 231. A misdescription of the property attached, when the officer is honestly and naturally misled by its appearance and use, will not make a return false. Neither will it avoid the attachment. Briggs *v.* Mason, 31 Vt. 433.

In an action of trespass for taking the article the plea may set up the attachment and its misdescription, and the taking may be justified thereunder. Briggs *v.* Mason, 31 Vt. 433.

1. Buckingham *v.* Osborne, 44 Conn. 133.

2. Smith *v.* Tooke, 20 Tex. 750.

3. Frink *v.* Scovel, 2 Day (Conn.) 480.

4. *Ante*, § 227; Crawford *v.* Nolan, 72 Iowa 673, 34 N. W. Rep. 754.

An officer having attached goods left them on the premises. In his return he added to his fees a claim of the plaintiff for storage. In an action against the officer for such storage his return was admitted in evidence of his knowledge and admission of the claim, but not evidence of the amount due therefor. Fitchburg R. R. Co. *v.* Freeman, 12 Gray (Mass.) 401.

5. Waterhouse *v.* Smith, 22 Me. 337; Nichols *v.* Patten, 18 Me. 231; Bruce *v.* Holden, 21 Pick. (Mass.) 187.

6. Morse *v.* Smith, 47 N. H. 474.

7. Major *v.* People, 40 Ill. App. 323.

person, although his return states it to be the property of the defendant.[1] The officer's return is, however, generally conclusive in all controversies in which the officer is not a party.[2]

The officer's return is always competent and legitimate evidence to show a proper service,[3] and that the property attached was such as might be legally seized under a writ,[4] but it is not competent to show acts which were in themselves mere trespasses and not done under the authority of the writ;[5] and it is *conclusive* evidence that everything has been done necessary to constitute a valid attachment. It can not be disproved in this regard by parol evidence.[6]

When an action is brought against a sheriff for a false return, he may amend it so as to make it speak the truth, and his amendment will relate back to the date of the original return and be a substitute for it.[7] But when an officer has made a false return he can not be compelled to amend it so as to state

1. Third Nat. Bank *v.* Elliott, 42 Hun (N. Y.) 121.

But it has been said in Alabama that where the sheriff's return fixed on him a liability to the plaintiff, it was not competent for him to prove, in a suit brought on such return by the plaintiff, that it was incorrect. He should, in such case, it was said, make an application to the court whence the process issued for leave to amend the return. The Governor *v.* Bancroft, 16 Ala. 605.

This is doubtless the better way, if made in apt time, but that he may, under a plea, justify himself by showing a mistake in the return. See Briggs *v.* Mason, 31 Vt. 433.

The sheriff may, however, by his acts, estop himself from contradicting his return. Where goods were attached and delivered to a receiptor, who thereafter purchased them subject to attachment, the sheriff then returning the same goods as attached on a subsequent writ, was not, in a suit against himself, permitted to contradict his last return, although he was permitted to give in evidence the sale to the receiptor. Denny *v.* Willard, 11 Pick. (Mass.) 519.

2. Pullen *v.* Haynes, 11 Gray (Mass.) 379; *ante*, § 226.

3. Foster *v.* Dryfus, 16 Ind. 158.

4. Polley *v.* Lenox Iron Works, 4 Allen (Mass.) 329.

5. In this case it was not admitted in an action against a creditor to show that in making such attachment the officer took possession of the store in which the goods were situate, by the direction of the creditor. Charles City Plow and Mfg. Co. *v.* Jones, 71 Iowa 234, 32 N. W. Rep. 280.

6. Lathrop *v.* Blake, 3 Foster (23 N. H.) 46.

7. Daniels *v.* Hamilton, 52 Ala. 105.

particular facts. The injured party has his remedy by an action against the officer and his sureties.[1]

§ 392. **Liability for breach of duty regarding custody of attached property.**—It being the duty of an officer attaching property to hold it during the continuance of the lien and to dispose of it according to the judgment of the court, he and his sureties will become liable to the party injured by his failure to perform his duty in this regard.[2] And he will also be liable for any injury done after the relinquishment of the attachment and before the property is delivered to the person entitled to the possession thereof.[3]

When money in specie is attached the same rule applies and the officer becomes liable if he does not keep it or pay it into court in the manner prescribed by statute or rule of court.[4] And the officer's duty regarding the safe keeping of personal property does not terminate with his removal from office or the expiration of his term. It extends to final judgment and thereafter to the expiration of the time within which a legal demand may be made on execution.[5] In regard to real estate,

1. Humphries *v.* Lawson, 7 Ark. 341.

2. Scarborough *v.* Malone, 67 Ala. 570; Traweek *v.* Heard, (Ala.) 12 So. Rep. 166; Selz *v.* Belden, 48 Iowa 451; Ross *v.* Philbrick, 39 Me. 29; First Ward Nat. Bank *v.* Thomas, 125 Mass. 278; Newman *v.* Kane, 9 Nev. 234; Foulka *v.* Pegg, 6 Nev. 136.

3. Becker *v.* Bailies, 44 Conn. 167.

Liability when perishable property sold.—Although the officer making an attachment of perishable property may sell the same before the termination of the suit, yet he must do so in compliance with the order of the court and keep the proceeds, in lieu of the property, to await the judgment in the attachment. Davis *v.* Ainsworth, 14 How. (N. Y.) Pr. 346; Adams *v.* Lane, 38 Vt. 640; Starr *v.* Moore, 3 McLean (U. S.) 354; Gamble *v.* Rhyne, 80 N. C. 183.

If he does not make the sale in the manner prescribed by law, or by the consent of the parties, he becomes a trespasser *ab initio*. Ross *v.* Philbrick, 39 Me. 29.

4. The Laurens and $20,000 in specie, 1 Abb. Adm. 508.

5. Tukey *v.* Smith, 18 Me. 125.

He can not avoid his personal liability by making a return of his attachment that it was made "at the risk of the plaintiff." Lovejoy *v.* Hutchins, 23 Me. 272.

But it has been held in Iowa that he may discharge his liability for the future custody of the property, when his term of office expires, by offering to deliver the attached property to his successor; such act devolves the duty of keeping the property upon the successor in office. Fockler *v.* Martin, 32 Iowa 117.

however, the officer gets no possession and his duties terminate when he has performed the acts necessary to the proper service and return of the writ.[1]

For release.—If he surrenders the property without authority of the court, or the taking of the bond as required by law, he is guilty of malfeasance and will be liable therefor at suit of the plaintiff, even though the damages are merely nominal;[2] but delivering them to a keeper by the consent of the plaintiff will lessen the officer's responsibility, though it will not extinguish it.[3] And if he surrenders them to a third person, who claims them, he renders himself liable to the true owner. Whenever he releases attached property he does so at his peril.[4] And obtaining the approval of the creditor to the sureties on a bond taken for the release of the property, will discharge him from liability to the plaintiff thereafter; but without such approval he is liable for the insufficiency of the sureties, although the debtor himself may become insolvent in the meantime.[5] A ratification of the release of the property absolves the officer from previous neglect and bars an action by the plaintiff.[6]

For permitting injury.—By keeping attached chattels in an unsafe place, or exposing them to injury or destruction, he ren-

1. Braley *v.* French, 28 Vt. 546.

2. De Yampert *v.* Johnson, 54 Ark. 165, 15 S. W. 363; Charnock *v.* Colfax, 51 Iowa 70; Whitney *v.* Farrar, 51 Me. 418; Phillips *v.* Bridge, 11 Mass. 242; State *v.* Langdon, 57 Mo. 353; Higgins *v.* Kendrick, 14 Me. 83; Griffin *v.* Isbell, 17 Ala. 184. See, *post*, § 396, "For Failure to Apply on Execution."

Not excused by apprehension of expense. — When an officer attaches animals, the owner must provide for their support at his peril; consequently no liability will accrue against the officer toward him. But the officer is answerable to the creditor for them, and his fear of incurring expense will not excuse him for not retaining them in his possession when they are attached. Sewall *v.* Mattoon, 9 Mass. 535; Tyler *v.* Ulmer, 12 Mass. 163; *ante*, § 263.

However, the officer has no right to take the defendant's hay, without his consent, to feed them. If he does he will be liable in trover for the hay. Kendall *v.* Morse, 43 N. H. 553.

3. Myers *v.* Myers, 8 La. Ann. 369.

4. Wadsworth *v.* Walliker, 45 Iowa 395, 51 Iowa 605.

5. Miner *v.* Coburn, 4 Allen (Mass.) 136.

6. Paterson Bank *v.* Hamilton, 13 N. J. L. (1 Green) 159; Le Roy *v.* Blauvelt, 13 N. J. L. (1 Green) 341; Scott *v.* Dow, 14 N. J. L. (2 Green) 350.

ders himself liable for the damage sustained, at suit of either party who is thereafter entitled to the property or its proceeds. If the creditor recover judgment on his attachment, the officer's liability is measured by the value of the property at the time it would have been seized and sold on execution, had not the loss taken place; or by the difference between the proceeds and what it would have produced had they not been injured.[1] But he is not liable for any loss or damage which was not occasioned by his neglect.[2]

Degree of care requisite.—The sheriff will be held to the same degree of prudence, vigilance and care, respecting the property which he has in his care and custody, as a careful and prudent

1. Weld *v.* Green, 10 Me. (1 Fairf.) 20; Franklin Bank *v.* Small, 24 Me. 52; Tyler *v.* Ulmer, 12 Mass. 163; Phillips *v.* Bridge, 11 Mass. 242; Congdon *v.* Cooper, 15 Mass. 10; Jenner *v.* Joliffe, 9 Johns. (N. Y.) 381; Conover *v.* Gatewood, 2 A. K. Marsh. (Ky.) 566; McLean *v.* Douglass, 6 Ired. (N. C.) L. 233; Barrett *v.* White, 3 N. H. 210; Fay *v.* Munson, 40 Vt. 468; Hubbell *v.* Root, 2 Allen (Mass.) 185; Scovill *v.* Root, 10 Allen (Mass.) 414; Mildmay *v.* Smith, 3 Saund. (Eng. K. B.) 343; Starr *v.* Taylor, 3 McLean (U. S.) 542.

Unnecessarily and wantonly removing hay at an unfit and improper season, whereby the same is injured, is an abuse of authority which will render the officer liable as a trespasser *ab initio*. Barrett *v.* White, 3 N. H. 210.

But the officer is liable to the plaintiff also for the safe keeping of the hay, and if he fails to place any one in charge of the property, or to guard it from removal, he is liable in damages to the plaintiff for any loss occasioned thereby. Fay *v.* Munson, 40 Vt. 468.

Where personal property, by reason of its bulk, can not be immediately removed, the officer must perform such acts of giving notice, as are required by the statute, or he will be liable for any loss resulting to the plaintiff for lack thereof. Hubbell *v.* Root, 2 Allen (Mass.) 185; Scovill *v.* Root, 10 Allen (Mass.) 414; *ante*, § 209.

2. Robinson *v.* Barrows, 48 Me. 186; State *v.* Dalton, 69 Miss. 611, 10 So. Rep. 578; Kendall *v.* Morse, 43 N. H. 553; Turney *v.* Carter, 3 Baxter (Tenn.) 199; Bridges *v.* Perry, 14 Vt. 262; Dorman *v.* Kane, 5 Allen (Mass.) 38; Wall *v.* Pulliam, 5 Heisk. (Tenn.) 365.

Officer's duty to pursue property taken from him.—Although an officer may not be guilty of negligence when property is forcibly taken from him or taken without his fault, yet it is his duty to pursue such property and recover it, by legal process, if necessary. If he does not do so he will be liable as for his negligent loss of the property. Lovejoy *v.* Hutchins, 23 Me. 272; Wood *v.* Bodine, 32 Hun (N. Y.) 354; Bridges *v.* Perry, 14 Vt. 262.

If he does retake it, and that from an officer who pretends to hold it under a writ, he will not become a trespasser, although there may be subse-

man would be likely to exercise over his own.[1] He is not liable for loss or injury which is not caused by his negligence or want of ordinary care. He is liable for the same degree of diligence as other bailees for pay.[2]

Must not use the property.—The officer, not being entitled to the use of attached property, is liable for any damage occasioned thereby; but he is not a trespasser *ab initio*, where such use does not injure the property; nor will he be liable in an action for damages when no damages have been occasioned.[3]

Liable for acts of bailee.—When the property attached is, by the officer, delivered into the hands of a keeper or receiptor,[4] such person is the agent of the officer making the attachment, and, for his torts or negligence in respect to the property, the officer is liable.[5] Where, however, the property is delivered to

quent error in the proceedings. Burroughs *v.* Wright, 19 Vt. 510.

When loss of goods may be pleaded in bar.—Since the sheriff is liable for the loss of goods taken on attachment and the plaintiff must look to him therefor, it follows that when the goods taken are equal in value to the judgment obtained against the defendant, the defendant may plead the attachment in bar in an action brought by the plaintiff. Starr *v.* Taylor, 3 McLean (U. S.) 542.

1. McRay *v.* Scott, 39 La. Ann. 1116, 2 So. Rep. 584; Burns *v.* Lane, 138 Mass. 350; *ante*, § 251.

He must do whatever acts are necessary to the preservation of the property. For example, where grain in the straw is attached, and it is necessary, for its safe keeping, that it be threshed, it is the duty of the officer to thresh it. Briggs *v.* Taylor, 28 Vt. 180.

2. Dorman *v.* Kane, 5 Allen (Mass.) 38; Kendall *v.* Morse, 43 N. H. 553; Turney *v.* Carter, 59 Tenn. 199; Ide *v.* Fassett, 45 Vt. 68; Bridges *v.* Perry, 14 Vt. 262; Norris *v.* McCanna, 29 Fed Rep. 757.

When goods are injured or destroyed by fire the officer is not liable therefor unless the fire was caused by his negligence. Norris *v.* McCanna, 29 Fed. Rep. 757.

He is not liable for the sudden death of a horse not caused by ill treatment. Turney *v.* Carter, 59 Tenn. 199.

The officer can not be held to extraordinary care.—Therefore where a horse was injured by reason of peculiar tricks, of which neither officer, the stable-keeper, where he was placed, nor the plaintiff had knowledge, the attachment debtor could not recover damages therefor. Parrott *v.* Dearborn, 104 Mass. 104.

3. Leavitt *v.* Butterfield, 15 Gray (Mass.) 67; Tandler *v.* Saunders, 56 Mich. 142; Banker *v.* Caldwell, 3 Minn. 94; Briggs *v.* Gleason, 29 Vt. 78; Lamb *v.* Day, 8 Vt. 407; Paul *v.* Slason, 22 Vt. 231.

4. *Ante*, § 264.

5. Gilbert *v.* Crandall, 34 Vt. 188; Austin *v.* Burlington, 34 Vt. 506; Briggs *v.* Gleason, 29 Vt. 78; Perry *v.* Williams, 39 Wis. 339.

And the insolvency of the receiptor and his consequent inability to re-

a bailee named by the plaintiff, the officer is relieved thereafter from responsibility to the plaintiff for the safe keeping of it.[1]

Must be proceeded against by suit.—The officer can not be proceeded against by motion and rule. The aggrieved party must seek redress by an action at law.[2] The defendant is not entitled to an action against the officer until he is entitled to the return of the property, and the plaintiff can have no action against the officer until he is entitled to have the property applied to satisfy an execution issuing on a judgment obtained in the suit in which the attachment issued.[3]

§ 393. **Liability for breach of duty regarding release of property on tender of bond.**—The general rules governing the release of the possession of the attached property by the giving of a bond in one of two different ways prescribed by law, *i. e.*, (1) by giving bond to deliver the property back to the sheriff, in the event of its being wanted to satisfy the judgment obtained in the suit in which the attachment issued, and (2) by giving bond to pay whatever judgment may be recovered in such action, have been hereinbefore stated.[4] Therefore, the liability incurred by the officer, through a failure to perform his duty in regard to the delivery or the release of the property upon the receipt of one of such bonds, is all that remains to be

spond in damages is said to furnish no defense in an action against the officer for not safely keeping the property. Austin *v.* Burlington, 34 Vt. 506; but see Runlett *v.* Bell, 5 N. H. 433; Howard *v.* Whittmore, 9 N. H. 133.

1. Donham *v.* Wild, 19 Pick. (Mass.) 520; Jewett *v.* Dockray, 34 Me. 45.

An approval by the plaintiff's attorney is an approval by the plaintiff. Jewett *v.* Dockray, 34 Me. 45.

Where there has been no injury no action can be sustained.

Therefore, where there has been a settlement of the suit in which the attachment has been made, no action can be sustained against the officer. Buck *v.* Ashley, 37 Vt. 475.

2. Gary *v.* McCown, 6 Ala. 370.

3. Bailey *v.* Hall, 16 Me. 408; Emery *v.* Seavey, 148 Mass. 566, 20 N. E. Rep. 177.

Officer liable for storage of property.—When an officer attaches chattels in the possession of an other than the owner, and keeps them upon the premises of such bailee, he is liable for their storage, though no agreement has been made to that effect and although he has had no notice to remove them. Fitchburg R. R. Co. *v.* Freeman, 12 Gray (Mass.) 401.

4. *Ante*, §§ 286 and 302.

treated of here. Some statutes make it obligatory upon the officer to accept a bond when it is tendered to him, in conformity with the statute, by the owner of the property, whether such owner be the attachment defendant or a third person, and render him guilty of trespass, if he refuse to accept such bond and deliver the property to the owner.[1] Other statutes permit the officer to exercise his discretion, whether he will or will not accept the bond tendered and release the property from the attachment lien.[2] An action for failure to release the property upon the tender of such a bond will, of course, lie at suit of the owner. In Alabama where more than one person not parties to the suit make tender of replevin bonds in compliance with the statute the sheriff may exercise his discretion in choosing between them.[3]

If the officer release the attached property upon the receipt of a bond, and such bond be improper or insufficient, he becomes liable to the attachment plaintiff for whatever damage may have been caused by his negligence. The plaintiff is the only person who can maintain an action against the officer in such cases. Other creditors of the attachment defendant have no cause of action thereon, although they may have obtained prior judgments.[4]

§ 394. **Liability for failure to return money into court.**—On the same principle that a bond may be received and the attached property released, the officer is sometimes permitted to receive a sufficient sum of money in lieu of the attached property to be held to satisfy the demand of the plaintiff when the same is thereafter substantiated by judgment. He may also seize specie in the first instance. In either of such cases the officer simply retains the money subject and the attachment lien in the same manner that he would have held the property, and his liability will be governed by the same rules, unless he is by law directed to pay the money into court, in which case he

1. Wheeler *v.* McDill, 51 Wis. 356; Cook *v.* Hopper, 23 Mich. 511.
2. Walker *v.* Hampton, 8 Ala. 412; Kirk *v.* Morris, 40 Ala. 225.
3. Kirk *v.* Morris, 40 Ala. 225.
4. Ford *v.* Perkerson, 59 Ga. 359.

will be liable on his bond if he does not do so. If he receives the money and releases the property before he has returned his writ of attachment he can make a return as of an attachment of money and no action will thereafter arise against him for the original attachment of the property of the defendant.[1]

§ 395. **Liability to defendant for failure to return property on dissolution of attachment.**—Whenever the attachment lien is dissolved, no matter for what cause nor at what stage of the proceedings soever, it becomes the immediate duty of the officer to return the property to the original owner. This does not depend upon the merits of the controversy nor whether the main action is terminated or is still pending. The lien being dismissed, the owner becomes entitled to the possession of the property, and a failure of the officer to surrender it not only renders him liable in trespass or trover, but is a breach of his official duty, for which he and his official bondsmen are liable in an action of damages.[2] The officer can not, however, be

1. Taylor *v.* Knowlton, 10 Allen (Mass.) 137.

Liability on accepting note.—An officer who has attached goods may lawfully accept a promissory note as security for the release of the property and if he do so his liability to the plaintiff will not be lessened unless the plaintiff has advised or consented to the taking of such note. He is bound to have the value of the property ready to satisfy whatever judgment the plaintiff may recover. Foster *v.* Clark, 19 Pick. (Mass.) 329. His conversion of the notes is a breach of official duty for which his bondsman will be also liable. Griffin *v.* Underwood, 16 Ohio St. 389.

2. Patton *v.* Garrett, 37 Ark. 605; Watkins *v.* Cawthon, 33 La. Ann. 1194; Patterson *v.* Spaulding, 5 La. Ann. 171; Scott *v.* Crane, 1 Conn. 255; Simpson *v.* Voss, 31 Kan. 227; Dennie *v.* Smith, 129 Mass. 143; Brown *v.* Atwell, 31 Me. 351; Clap *v.* Bell, 4 Mass. 99; Vosburgh *v.* Welch, 11 Johns. (N. Y.) 175; Mullen *v.* Sherman, 37 Vt. 493; Frost *v.* Kellogg, 23 Vt. 308; Gleason *v.* Briggs, 28 Vt. 135.

The officer and his bailees are responsible for the goods attached, even though there be no judgment whatever. Brown *v.* Atwell, 31 Me. 351.

If the attachment defendant contemplates bringing an action of tort because the property is not returned on dissolution of the attachment, he must bring it against the attaching officer. He can not maintain an action of tort against the plaintiff in such suit for the article attached, although he may have prevailed in his suit and recovered costs against the attachment plaintiff. Cross *v.* Elliot, 69 Me. 387.

Burden of proof—Measure of damages.—When an attachment is dis-

charged as a wrong-doer for retaining the possession of property which he has attached, until satisfactory proof has been made to him that the attachment has been vacated, even though the debt for the collection of which the attachment was made may have been paid.[1]

Where a sale of the attached property has been made accord-

charged the presumption is, in the absence of proof to the contrary, that the property was returned to the defendant. If the property is not returned, the measure of damages is the injury sustained by the detention of the goods. Patton *v.* Garrett, 37 Ark. 605.

If there has been a conversion, the value of the property is the measure of damages. And if the officer is sued for a conversion he may show a return of the property in mitigation of damages. Vosburgh *v.* Welch, 11 Johns. (N. Y.) 175.

A return to a co-tenant is sufficient.—If the interest of one tenant in common in personal property has been attached and the attachment is dissolved, the officer may relieve himself from liability to the defendant by returning the property to his co-tenant. Frost *v.* Kellogg, 23 Vt. 308.

Measure of damages for second attachment.—When an officer attaching on a second writ holds possession under the first writ, and the property is not retained on the second after its release from the first, the owner will be entitled only to nominal damages; for the second seizure was merely constructive. Patterson *v.* Spaulding, 5 La. Ann. 171.

Action against officer or deputy.—When an attachment has been made by a deputy sheriff he is himself liable to all actions for misfeasance; but for nonfeasance, which is a breach of official duty, the action must be brought against his principal, the sheriff. Gleason *v.* Briggs, 28 Vt. 135.

Officer liable for acts of bailee.—When a sheriff who has attached money leaves it in the hands of a third person, whose receipt therefor he takes, and the attachment is thereafter dissolved, the sheriff is accountable to the defendant in the same manner as though the money had been taken into the sheriff's own possession. Watkins *v.* Cawthon, 33 La. Ann. 1194.

Officer can not deny defendant's title.—After an officer has attached property as belonging to the defendant, he can not, after dissolution of the attachment proceedings, defend his seizure and possession upon the ground that the property did not belong to the attachment defendant—Penobscot Boom Corporation *v.* Wilkins, 27 Me. 345—and that the sale and transfer to the attachment defendant was fraudulent. Simpson *v.* Voss, 31 Kan. 227.

1. Wheeler *v.* Nichols, 32 Me. 233.

But after judgment has been obtained against him for wrongfully refusing to deliver the property after dissolution of the attachment, it is too late for him to urge, in an action against the sureties on his bond, that before complying with a demand for return he was entitled to a certified copy of the order vacating the attachment. Bowe *v.* Wilkins, 105 N. Y. 322, 11 N. E. Rep. 839.

ing to law or by the consent of the debtor, the proceeds of such sale on dissolution of the attachment must be by the officer returned to the attachment defendant, or he will be liable as for a conversion.[1]

§ 396. Liability for failure to properly apply chattels on execution.—It is the duty of the attaching officer to have it always within his power to apply the attached property in satisfaction of an execution issued upon a judgment obtained by the plaintiff in the attachment suit.[2] If he fails to apply the property rightfully, both the plaintiff and defendant will have a cause of action against him for any injury sustained. The plaintiff has a right to have the property sold on execution, when a demand is made thereon, and the proceeds applied to the satisfaction of the judgment obtained; and for not fulfilling his duty in this regard the sheriff and his official bondsmen are liable to the extent of the judgment when the same is less than the value of the property, and to the extent of the value of the property when the same is less than the amount of the judgment.[3]

1. Hewes *v.* Parkman, 20 Pick. (Mass.) 90; Cross *v.* Elliott, 69 Me. 387.

Where a partner of the attachment defendant has agreed to the sale of the attached goods and the defendant has subsequently assented to and ratified the same he can not thereafter have an action against the officer on account of such sale. Hewes *v.* Parkman, 20 Pick. (Mass.) 90.

Any disposition of attached property not warranted by law renders the officer a trespasser *ab initio*. Culver *v.* Rumsey, 7 Ill. App. 422.

2. *Ante*, § 243.

3. Weaver *v.* Wood, 49 Cal. 297; McComb *v.* Reed, 28 Cal. 281; Royse *v.* Reynolds, 10 Bush. (Ky.) 286; Whitney *v.* Farrar, 51 Me. 418; Mills *v.* Gilbreth, 47 Me. 320; French *v.* Stanley, 21 Me. 512; Fairbanks *v.* Stanley, 18 Me. 296; Blake *v.* Kimball, 106 Mass. 115; Rich *v.* Bell, 16 Mass. 294; Cooper *v.* Mowry, 16 Mass. 5; Congdon *v.* Cooper, 15 Mass. 10; Phillips *v.* Bridge, 11 Mass. 242; Fitzgerald *v.* Jordan, 11 Allen (Mass.) 128; Fairfield *v.* Baldwin, 12 Pick. (Mass.) 388; Howard *v.* Smith, 12 Pick. (Mass.) 202; Trowbridge *v.* Bullard, 81 Mich. 451, 45 N. W. Rep. 1012; Lovell *v.* Sabin, 15 N. H. 29; Denton *v.* Livingston, 9 Johns. (N.Y.) 96; Dorrance *v.* Commonwealth, 13 Pa. St. 160; Hurlock *v.* Reinhardt, 41 Tex. 580; Austin *v.* Burlington, 34 Vt. 506; Abbott *v.* Edgerton, 30 Vt. 208; Ayer *v.* Jameson, 9 Vt. 363; Wheeler *v.* McDill, 51 Wis. 356; Halpin *v.* Hall, 42 Wis. 176.

And the fact that the attaching

The action can not be sustained against the officer for failing to apply the proceeds of the sale to the satisfaction of an execution, until after the return day of such execution. He may pay it to the plaintiff before he makes return if he sees fit, but this is his privilege, and not his obligation.[1] And, if begun after the return of the execution, it can not be sustained, un-

officer has already applied the property in satisfaction of an execution issuing on a judgment obtained in a subsequent attachment will not lessen his liability to the first attaching creditor. The sheriff is liable to the first attaching creditor for the amount for which he recovers judgment, or for the amount of the proceeds if less than the amount of the judgment. Weaver *v.* Wood, 49 Cal. 297.

Measure of damages.—In a suit on a sheriff's bond for his failure to apply the attached property in satisfaction of the judgment for the plaintiff the measure of damages is the value of the property and not the amount of the judgment. Hurlock *v.* Reinhardt, 41 Tex. 580; Dorrance *v.* Commonwealth, 13 Pa. St. 160; Fairbanks *v.* Stanley, 18 Me. 296.

Or if previously sold then it is the market value at the time of sale with interest therefrom. Newman *v.* Kane, 9 Nev. 234.

He is liable although he may never have received the proceeds of the property on the sale thereof. Denton Livingston, 9 Johns. (N. Y.) 96. And although he may have received the money and paid it in satisfaction of a void or fraudulent judgment. Trowbridge *v.* Bullard, 81 Mich. 451, 45 N. W. Rep. 1012; Fairfield *v.* Baldwin, 12 Pick. (Mass.) 388.

Where there are paramount liens upon the property and the sheriff is compelled to discharge the same he is only liable to the attachment plaintiff in the amount of the residue, in an action for failure to apply the property on execution. Halpin *v.* Hall, 42 Wis. 176.

Nominal damages only.—Where the attachment was merely nominal, the officer not having taken possession of the property, the plaintiff can have no damages because of the officer's failure to have the property to respond to the judgment. Abbott *v.* Edgerton, 30 Vt. 208. And where, although he may have parted with it, he shows that the plaintiff could not have acquired any benefit from the attachment he will be held to nominal damages merely. Rich *v.* Bell, 16 Mass. 294.

Showing that the property was applied on an execution issued on a judgment in a mortgage foreclosure suit from a co-ordinate court, and that the mortgage lien was prior to the attachment lien, will exonerate the officer from all but nominal damages at most. Metzner *v.* Graham, 66 Mo. 653.

Liable for surplus when liens discharged.—If the officer having attached property is compelled to satisfy prior liens he is yet liable to the attachment plaintiff for the remainder of the proceeds of the foreclosure sale after the lien is discharged. Harvey *v.* Foster, 64 Cal. 296, 30 Pac. Rep. 849.

1. Campbell *v.* Hasbrook, 24 Ill. 243; McInerney *v.* Chicago Times, 41 Ill. App. 438.

less a demand has been made upon the officer, or it be shown that he had himself applied it, thereby rendering a demand needless.[1] The liability of the officer for the application of the property to the satisfaction of the plaintiff's judgment depends upon a demand being made upon him by the plaintiff or other person legally in charge of an execution issued upon such judgment. If no such demand is made within the proper time the attachment lien is lost and the officer and his official bondsmen are not liable to an action of their bond.[2] While the officer making the attachment yet holds his office with power to serve an execution, the delivery to him of a proper execution, within a proper time, by the plaintiff, charges him with a satisfaction of such execution by an application of the property in his hands.[3] If he is not still an incumbent of the office he held when making the attachment, a demand made on him in any form of words is sufficient if it informs him that the proper officer having the execution desires to obtain such property from him for the satisfaction of the execution.[4] But a demand upon the officer having possession is indispensable to fix his liability unless other facts are shown to supersede the necessity of a demand.[5]

1. White *v.* Miller, 3 Dev. & B. (N. C.) L. 55; Nutzenholster *v.* The State, 37 Ind. 457.

2. State *v.* Atkinson, (Ark.) 13 S. W. Rep. 415; Norris *v.* Bridgham, 14 Me. 429; Howard *v.* Smith, 12 Pick. (Mass.) 202; Snell *v.* Allen, 1 Swan (Tenn.) 208; Jameson *v.* Mason, 12 Vt. 599.

3. Enos *v.* Brown, 1 D. Chipman (Vt.) 280.

4. Hapgood *v.* Hill, 20 Me. 372.

5. Wetherell *v.* Hughes, 45 Me. 61.

On a showing by the plaintiff that he has paid the value of the attached property, on a judgment in trespass obtained against the officer by the debtor because the goods were exempt from attachment, the officer is liable to the creditor for the goods, although no demand be made upon him within the time required by the statute. Howard *v.* Smith, 12 Pick. (Mass.) 202.

Defenses.—In defending an action brought against him for failure to apply the attached property in satisfaction of a judgment obtained in the attachment suit, the sheriff is not allowed to impeach the creditor's judgment, unless obtained by fraud. Adams *v.* Balch, 5 Me. 188; West *v.* Meserve, 17 N. H. 432; McComb *v.* Reed, 28 Cal. 281. But he is not estopped from denying that the property attached did not in fact belong to the attachment defendant, and therefore that the attachment plaintiff is not entitled to the proceeds of the sale of it. Dobbs *v.* Justices 17

The liability of the attaching officer arises only because of his failure to perform his duty in applying the proper *proceeds*

Ga. 624; French *v.* Stanley, 21 Me. 512; Fuller *v.* Holden, 4 Mass. 498; West *v.* Meserve, 17 N. H. 432; Harris *v.* Kirkpatrich, 35 N. J. L. 392; Chapman *v.* Smith, 16 How. (U. S.) 114.

Even though he may have returned the property to the debtor, he may show that he did so while acting under a misapprehension, and that the property did not in truth belong to the debtor. Sawyer *v.* Mason, 19 Me. 49; State *v.* Ogle, 2 Houston (Del.) 371.

It is no defense that the property has been taken by a trespasser from the custody of the officer or his keeper —Lovell *v.* Sabin, 15 N. H. 29—unless, after the officer shows the attendant circumstances, the creditor, on whom is the burden of proof, fails to show that the officer was negligent, Mills *v.* Gilbreth, 47 Me. 320; or fails, also, to show that he has taken out execution after judgment and within the time prescribed by law. He must show that he would be entitled to the goods if they had been faithfully kept. Blake *v.* Kimball, 106 Mass. 115.

It is no defense that the property is not at the place where the demand is made of the officer, nor even that it is outside of his official precinct, and has been levied upon by another officer. Scott *v.* Crane, 1 Conn. 255. Nor is it a defense that prior to the return day of the execution he received a writ of attachment against the judgment creditor which he served on the judgment debtor, and received a certificate of indebtedness to the plaintiff in the amount of the judgment. Such attachment does not prevent him from collecting the execution, nor does the service of such attachment dispense with the duty imposed upon him to return the execution. Wehle *v.* Conner, 63 N. Y. 258. But if the property, when demanded, is in another place, and the officer making the demand refuses to go with him and receive it, he will be discharged from his liability to produce the property on execution. Gordon *v.* Wilkins, 20 Me. 134.

It is no defense that the officer has been put to great expense in keeping or preserving the property, or that the expense of keeping animals would have amounted to more than their value. Newman *v.* Kane, 9 Nev. 234; Tyler *v.* Ulmer, 12 Mass. 163. It is a defense to show that the property was delivered to a receiptor by the advice of the plaintiff or his attorney. Rice *v.* Wilkins, 21 Me. 558. But not when he has had no choice in selecting such receiptor. Austin *v.* Burlington, 34 Vt. 506; Farnum *v.* Gilman, 24 Me. 250. Nor will such approval exonerate the officer from an effort to find the property, that it may be sold on execution. Allen *v.* Doyle, 33 Me. 420.

By force of the law relating to receiptors in some of the New England states, an attaching officer who has delivered the property upon the receipt on the promise to redeliver of a third person apparently in good circumstances, will be exonerated if on execution he demands the property of such person, and is unable to obtain it in due season. Howard *v.* Whittemore, 9 N. H. 133, *ante*, § 272. It has also been held to be a good defense for the officer to show that the property he attached was not subject to attachment because of being in the

of the attached chattels to the satisfaction of the judgment creditor's execution. The officer is not required to deliver the property itself to such creditor, and the latter can not maintain an action against him when he refuses so to do. When a sale is being made according to law, the officer is not liable to the creditor until the sale is effected.[1]

Furthermore, the officer is not, even after he has procured the money upon the sale of the attached chattels, liable to the plaintiff in trover. Money in the hands of a sheriff obtained on execution is not the property of the judgment creditor until it is paid over to him; consequently, while the withholding of it from the creditor after the return day of the writ will render the officer liable in damages, he can not be guilty of a conversion of the plaintiff's property.[2]

The officer is liable also to be fined for contempt of court for failing to perform his duty in reducing the attached property to money by a sale and applying the proceeds as commanded by the execution issuing out of such court.[3]

§ 397. Liability for failure to account for proceeds of sale. —The officer who made the attachment, having sold the attached property on execution issuing on a judgment obtained therein, is not only liable to the attachment plaintiff for the amount of his judgment or the value of the property, but he is liable to the defendant, or his assignee, or a lienor, or other person having an interest therein. The attaching officer has only such special interest in the attached property as the lien of attachment creates. This is measured by the amount necessary to pay the debt: and for any part of the proceeds which

possession of the guardian of an insane person. Hale *v.* Duncan, Brayton (Vt.) 132.

1. Blake *v.* Shaw, 7 Mass. 505.

2. Zschocke *v.* The People, 62 Ill. 127; Lightner *v.* Steinagel, 33 Ill. 510. Nor can it be levied upon as property of the creditor in the officers hands, even by the officer himself. First *v.* Miller, 4 Bibb (Ky.) 311.

3. Grandstaff *v.* Ridgely, 30 Gratt. (Va.) 1.

When the officer's sureties pay such fine, and a subsequent proceeding is brought against them upon the judgment on which the execution issued, they are entitled to be credited with the amount of the fine or fines which they have so paid. Grandstaff *v.* Ridgely, 30 Gratt. (Va.) 1.

remains after sale and satisfaction of the execution, or for any injury sustained by an unlawful application of the proceeds, the officer is liable to the person injured, after proper demand or notice has been duly served upon him.[1] Where, however, the officer has paid over the money collected on the execution, to the plaintiff's order, he can not thereafter be held liable for such proceeds to the debtor, should a reversal of the judgment be obtained on appeal.[2]

The action does not accrue against the officer for the moneys obtained on execution until after the return day of such writ.[3] And, although the return day of the writ has passed, an action can not be maintained until a demand is made upon the officer unless it is shown that he has misapplied it and that a demand would be unavailing.[4]

1. O'Brien *v.* Merchants' Ins. Co., 16 Abb. (N. Y.) Pr. N. S. 212; Rankin *v.* Ekel, 64 Cal. 446; Cross *v.* Elliot, 69 Me. 387; Liljengren *v.* Ege, 46 Minn. 488, 49 N. W. Rep. 250; Kerr *v.* Drew, 90 Mo. 147; First Ward Nat. Bank *v.* Thomas, 125 Mass. 278; Rodriques *v.* Trevino, 54 Tex. 198; Woodborne *v.* Scarborough, 20 Ohio St 57.

If the goods were sold at auction and the proceeds are retained by the auctioneer, the officer is nevertheless liable on the theory that such auctioneer acted as agent or keeper of the sheriff. Griffin *v.* Helmbold, 72 N. Y. 437.

2. Elliot *v.* Sneed, 2 Ill. (1 Scam.) 517.

When excessive attachment has been made, and more is sold on execution than is necessary to satisfy the judgment, and while the remaining property is returned in a damaged condition the surplus of the proceeds of the sale on execution is retained by the officer, he is liable for the surplus and for the damage to the owner of the property. And the fact that such owner purchased the property prior to the attachment and that his title was in fraud of creditors and void as to them does not affect the liability of the officer to such purchaser. Waterbury *v.* Westervelt, 9 N. Y. (5 Seld.) 598.

3. McInerney *v.* Chicago Times Co., 41 Ill. App. 438.

4. Nutzenholster *v.* The State, 37 Ind. 457; White *v.* Miller, 3 Dev. & B. (N. C.) L. 55.

Deduction of expenses and fees. Whatever expenses the officer may have incurred that are legally chargeable against the defendant by the keeping of the property, or whatever compensation he may be entitled to therefor—*ante*, § 263—may be taken from the part of the proceeds to which the attachment defendant is otherwise entitled. But the officer has no power to deduct from a balance in his hands, arising from a sale of attached property, counsel fees for defending an action of trover brought against him by a third person for the conversion of the goods levied on under the attachment. Cramer *v.* Brasher, 15 Colo. 216, 25 Pac. Rep. 180.

§ 398. **Liability for expense of keeping the property pending suit.**—The officer is primarily liable for all expenses incurred for the keeping of goods or animals between the time of the levy and the termination of the attachment.[1] These expenses, whether for labor and care, for feed and stabling, or for whatever else they may be, may be recovered from the officer upon his express or implied contract in an action brought by the person entitled thereto. The officer may, however, ultimately recover the amount from the plaintiff or defendant, as the case may be after the rights of the attachment are determined. There is usually a provision of the controlling statute directing that such necessary expenses be taxed as costs along with the sheriff's fees, and that judgment be rendered therefor against the plaintiff and in favor of the defendant when the defendant prevails in the suit; and that when the plaintiff prevails the same be taxed against the defendant and taken from the proceeds of the property. In either event the officer is entitled to his expenses from the party recovering judgment.[2] When there is no such provision of the statute and the attachment is dismissed by judgment for the defendant, or when it is dismissed at the instance of the plaintiff, the plaintiff is liable to reimburse the officer.[3] When the defendant's animals

1. Rowley *v.* Painter, 69 Iowa 432. *Ante*, § 263.

2. Rowley *v.* Painter, 69 Iowa 432; McNeil *v.* Bean, 32 Vt. 429; O'Connor *v.* O'Connor, 47 N. Y. Super. Ct. 498; The Independent, 9 Ben. 489; Blake *v.* Baldwin, 54 Conn. 5; Lynch *v.* Butler, 43 Hun (N. Y.) 605; Woodruff *v.* Imperial Fire Ins. Co., 27 Hun (N. Y.) 229.

3. Phelps *v.* Campbell, 1 Pick. (Mass.) 59.

When a creditor instructs an officer to attach property in the possession of the debtor, the law implies a promise on the part of the creditor to indemnify the officer for any damage suffered in consequence of such illegal attachment. Gower *v.* Emery, 18 Me. 79.

But the officer can not charge the plaintiff with expenses incurred in holding the property after he has been notified that the plaintiff has released his claim. Hall *v.* United States Reflector Co., 34 Hun (N. Y.) 467. Nor can he recover for the keeping of a horse when he has used the horse enough to compensate him therefor. Dean *v.* Bailey, 12 Vt. 142. An officer will not be allowed to make a gain out of property intrusted by the law to his custody not for his own benefit, but for the benefit of others. Gannett *v.* Cunningham, 34 Me. 56.

Attorney pensonally liable.—In one

are legally attached he must provide for them at his peril.[1] And if they are provided for by the officer he is entitled to reimbursement from the owner.[2] Although the statute provide for "poundage" the officer is not entitled thereto when an attachment he has made is subsequently settled or dismissed before a sale is made of the property. He is then only entitled to compensation for his trouble and expenses in taking and caring for the property.[3]

§ 399. **Defenses to actions brought by third persons.**—An officer has no right to attach the property of any one other than the attachment defendant, and he will, in general, be liable to any third person whose property or interest he seizes on attachment.[4] But he may, nevertheless, sometimes defeat such an action brought against him by showing that the third person is estopped from maintaining it.[5]

case it is held that the attorney for the plaintiff who gives a writ to an officer for service, becomes personally liable to the latter unless he is personally informed by the attorney to the contrary, or the circumstances clearly indicate that such was the understanding. Heath *v.* Bates, 49 Conn. 342, s. c. 44 Am. Rep. 234.

1. Sewall *v.* Mattoon, 9 Mass. 535.

2. *Ante*, § 263.

3. Germ. Am. Bk. *v.* Morris Run Coal Co., 68 N. Y. 585; Ridlon *v.* Flanigan, 12 Hun (N. Y.) 115.

4. *Ante*, § 387.

5. Tufts *v.* McClintock, 28 Me. 424.

The officer attaching goods on a civil process is entitled to notice of the claim of a third person thereto; and a demand for them must be made of him, as required by statute, or he can not be held liable in damages. Taylor *v.* Seymour, 6 Cal. 512.

A third party's right of action against the officer will be waived by his telling such officer that the property belongs to one other than himself. Clark *v.* Dean, 143 Mass. 292, 9 N. E. Rep. 651.

Mitigation of damages.—The officer can not justify his trespass under a plea of the general issue, but he will be permitted to show any matter going to the mitigation of damages. Collins *v.* Perkins, 31 Vt. 624.

He may show in mitigation of damages, when sued for forcibly entering a house, making an assault and carrying away furniture, that he entered to make an attachment, even though the same was unlawful by reason of the writ not having been returned. He may also show that a settlement had been made by the parties to the writ stipulating that the property be restored and that the writ be not returned. Paine *v.* Farr, 118 Mass. 74.

The officer may, in mitigation of damages, likewise show that he released the property as soon as he ascertained that it did not belong to the attachment defendant, but such a showing will not exonerate him for the wrongful taking. Carpenter *v.*

The officer may always justify his seizure by showing that the property was legally attached under a writ in his possession.[1] But this he can not do in an action brought by a stranger, from whose possession the property was taken,[2] unless he shows that all the preliminary proceedings in the attachment were regular and that the defendant is indebted to the plaintiff; for, without this, there can be no valid attachment.[3] He must also

Dresser, 72 Me. 377; Kreher *v.* Mason, 20 Mo. App. 29.

1. The extent to which the writ protects the officer as against the attachment defendant, see *ante*, § 204.

2. Even though he claim to have attached only the interest of the defendant. Rankin *v.* Ekel, 64 Cal. 446.

3. Horn. *v.* Corvarubias, 51 Cal. 524; Buddee *v.* Spangler, 12 Colo. 216, 20 Pac. Rep. 760; McCraw *v.* Welch, 2 Colo. 284; Howard *v.* Manderfield, 31 Minn. 337; Sexey *v.* Adkinson, 34 Cal. 346; Matthews *v.* Densmore, 43 Mich. 461; Hines *v.* Chambers, 29 Minn. 7; Booth *v.* Rees, 26 Ill. 45; Bartlett *v.* Cheesebrough, 32 Neb. 339, 49 N. W. Rep. 360; Oberfelder *v.* Kavanaugh, 21 Neb. 483, 32 N. W. Rep. 295; Williams *v.* Eikenberry, 25 Neb. 721, 41 N. W. Rep. 770; Paxton *v.* Moravek, 31 Neb. 305, 47 N. W. Rep. 919; Damon *v.* Bryant, 2 Pick. (Mass.) 411; Van Etten *v.* Hurst, 6 Hill (N. Y.) 311; Newton *v.* Brown, 2 Utah 126; Bogert *v.* Phelps, 14 Wis. 88; Remington *v.* Bailey, 13 Wis. 370, (332.)

Prima facie case.—In California a *prima facie* justification is made by the officer in such a case by producing the writ, which is regular, and issued from a competent court. Brichman *v.* Ross, 67 Cal. 601. But this is a more liberal construction than is generally given to the rule.

Nebraska holds to the other extreme, and says that to justify the seizure of goods found in the possession of a stranger, against whom no element of estoppel exists, the officer must, in order to justify his seizure, both allege and prove, not only the issuing of the attachment, but every material fact and condition necessary to the regularity of its issue. Oberfelder *v.* Kavanaugh, 21 Neb. 483, 32 N. W. Rep. 295.

The jurisdiction of the court over the parties and the subject-matter, is included within this requirement. It is not sufficient to simply introduce the writ. Hakanson *v.* Brodke, 36 Neb. 42, 53 N. W. Rep. 1033.

Proof of indebtedness.—In Illinois a positive statement of indebtedness in the affidavit is sufficient, although as to other matters the affidavit be made on "information and belief." Booth *v.* Rees, 26 Ill. 45.

And this is true in California, although the affidavit was originally insufficient and was amended subsequent to the seizure, *if the property was in the possession of the defendant.* Babe *v.* Coyne, 53 Cal. 261.

But in Michigan an affidavit in attachment does not establish the fact of indebtedness as against third parties. Cook *v.* Hopper, 23 Mich 511.

The judgment in the action will be evidence of its indebtedness, if the court had jurisdiction. Hines *v.* Chambers, 29 Minn. 7.

Although not recovered till after an issue was joined in the suit against the officer for the wrongful attachment. Rinchey *v.* Stryker, 28 N. Y. 45.

show that a writ of attachment has been duly returned into court.[1]

When a stranger to the writ, claiming to own the property, brings replevin (or other action) against the officer who made the attachment, such officer, after establishing the existence of the indebtedness of the defendant, may impeach the claimant's title by showing that it was obtained in fraud of creditors.[2] The mere proof, however, that the claimant has not good title will be unavailing, for if the debtor does not himself own the property, it is immaterial who does own it.[3]

§ 400. **Extent of liability—Judgment.**—The owner of property, wrongfully taken from him by attachment, may, in any action against the officer therefor, recover judgment in the amount of the damages he has sustained. This rule is general, and where the officer has acted without malice and in good faith the recovery will be limited to this amount. When the property is wholly lost the measure of damages will be the

1. Russ *v.* Butterfield, 6 Cush. (Mass.) 242; Sias *v.* Badger, 6 N. H. 393.

But he may show in *mitigation of damages* that his seizure was made under a writ, although the same was not returned. Paine *v.* Farr, 118 Mass. 74.

None but the officer can justify.—In an action of trover, brought against the officer, the attachment plaintiff and his attorney, no justification can be made as to their joint liability. The officer is the only person who would have rightful possession. Cook *v.* Hopper, 23 Mich. 511.

Further evidence when officer justifies. In an action against the officer for a wrongful taking, wherein he justifies under an attachment, the plaintiff may show without further pleading that the attachment was vacated and that the sheriff subsequently refused to return the property. Bowe *v.* Wilkins, 105 N. Y. 322, 11 N. E. Rep. 839.

It may also be shown and by oral evidence after justification that other property was taken than that described in the officer's return on the writ. Carpenter *v.* Scott, 86 Iowa 563, 53 N. W. Rep. 328.

2. Gates *v.* Gates, 15 Mass. 310; Williams *v.* Morgan, 50 Wis. 548; Braley *v.* Byrnes, 20 Minn. 435; Whittle *v.* Bailes, 65 Mich. 640, 32 N. W. Rep. 874; Maley *v.* Barrett, 2 Sneed (Tenn.) 501; Schlussel *v.* Willett, 34 Barb. (N. Y.) 615, 12 Abb. Pr. 397; Jacobs *v.* Remsen, 35 Barb (N. Y.) 384, 12 Abb. Pr. 390. But see Deutsch *v.* Reilly, 57 How. (N. Y.) Pr. 75.

It is said that the question is whether there is such fraud in the sale to the third person as to prevent title from passing to him. Walker *v.* Collins, (Cir. Ct. App.) 50 Fed. Rep. 737.

3. Siedenbach *v.* Riley, 36 Hun (N. Y.) 211.

value of the property at the time of the taking with interest on that sum to the time of the judgment. When the property has been injured or has depreciated in value during the detention the actual damages recoverable will be measured by the amount of injury sustained.[1] But where the officer oversteps or abuses his powers by grossly and willfully committing unnecessary acts tending to insult, injure, harass or annoy the owner of the property, the recovery in an action brought upon such wrongful attachment need not be restricted to what is termed actual or compensatory damages; for when such acts of malfeasance are clearly proven the recovery may include what is variously termed punitive, vindictive, or exemplary damages.[2]

In an action on the officer's bond against the sureties thereon the recovery is generally limited to such amount as will secure the owner against the damages and costs resulting from the wrongful attachment, so long as the same does not exceed the amount nominated in the bond.[3]

The measure of damages in particular instances, as well as what may be shown in mitigation of damages in many instances, has been more accurately indicated in the preceding sections of this chapter treating of particular liability or liability to particular persons, than could be done here, therefore to avoid repetition reference is now made thereto.[4]

1. Heidenheimer *v.* Sides, 67 Tex. 32; Dorsey *v.* Manlove, 14 Cal. 553; Pierce *v.* Strickland, 2 Story (U. S.) 292; Perkins *v.* Pitman, 34 N. H. 261; Brobst *v.* Skillen, 16 Ohio St. 382; Weston *v.* Dorr, 25 Me. 176; Treat *v.* Barber, 7 Conn. 274; Becker *v.* Bailies, 44 Conn. 167.

2. Nightingale *v.* Scannell, 18 Cal. 315; Dorsey *v.* Manlove, 14 Cal. 553; Treat *v.* Barber, 7 Conn. 274; Loader *v.* Hinson, 4 Jones (N. C.) L. 369; Rodgers *v.* Ferguson, 36 Tex. 544.

3. Ellis *v.* Allen, 80 Ala. 515, 2 So. Rep. 676; Boatwright *v.* Stewart, 37 Ark. 614; Karch *v.* Commonwealth, 3 Pa. St. 269; Zeigler *v.* Commonwealth, 12 Pa. St. 227; Taylor *v.* Johnson, 17 Ga. 521; Dobbs *v.* Justices, 17 Ga. 624; State *v.* Atkison, 17 Ind. 26; State *v.* Johnson, 7 Ired. (N. C.) L. 77; Brobst *v.* Skillen, 16 Ohio St. 382; Griffin *v.* Underwood, 16 Ohio St. 389.

Where there is a conversion of goods without any aggravating circumstances the measure of damages is the value of the goods at the time they were taken, with legal interest to the day of the trial. Ellis *v.* Allen, 80 Ala. 515, 2 So. Rep. 676.

4. See, *supra*, §§ 384–398, notes.

CHAPTER XVIII.

PRIORITIES.

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422. When trustee has prior title.
423. When assignee has prior title.
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§ 401. How priorities determined.—Attachments are frequently made upon a debtor's property by several creditors in such quick succession, or under such circumstances, that they are not willing to concede which acquires the prior lien. In this case the matter must be determined by a court having

jurisdiction to consider such matter. If the writs all issue from one court, then the question will, of course, be determined by such court; but if the several writs have issued from different courts, then a complication arises as to which court has jurisdiction to determine the priority. To avoid a complication of this nature it has been provided by statutes in some states that where there are conflicts between the claims of attaching creditors under writs issuing from different courts, but levied on the same property, or the same persons are made garnishees in several cases, the rights in the matter "shall be determined by that court out of which the first writ issued."[1]

§ 402. **Priorities not favored.**—Attachment being a harsh remedy,[2] an attaching creditor is regarded with less favor by the present policy of our law than he formerly was when an attachment of a debtor's property was the only mode of compelling an appropriation of it to the payment of his debts. This is particularly true in view of the fact that an attaching creditor gains a preference over other creditors; while the policy of our law as expressed in the acts relating to insolvency favors an equal distribution of the effects of a debtor among all of his creditors.[3] Therefore the courts hold the parties to very strict

1. Sutton *v.* Stevens, 41 Mo. App. 42; Metzner *v.* Graham, 57 Mo. 404; First Nat. Bank *v.* Brenneisen, 97 Mo. 145, 10 S. W. Rep. 884; State *v.* Harrington, 28 Mo. App. 287; State *v.* Duncan, 37 Neb. 631, 56 N. W. Rep. 214.

And in Missouri, if the officer disregards the provisions of the statute which provides for the settling of questions of priority between different attaching creditors, and decides the question for himself, he does so at his peril; and if he pays money to the wrong party he commits a wrong for which he and his sureties will be liable. Howard *v.* Clark, 43 Mo. 344.

As a general rule, the law takes no notice of a fraction of a day, but in determining the priority between writs which have issued on the same day the more minute measures of time are sometimes taken into consideration. *Post*, § 409, "Simultaneous Attachments."

Priority between garnishments is usually determined by the answer of the garnishee, which is *prima facie* proof of the matters therein contained; but in Georgia it is said that the priority of the liens of judgment creditors upon the fund in the hands of a garnishee may be inquired into upon his affidavit setting up payment to one and alleging illegality in the proceedings of another. Shorter *v.* Moore, 41 Ga. 691. Further, see *post*, Vol. II.

2. *Ante*, §§ 2 and 8.

3. Colt *v.* Ives, 31 Conn. 25.

rules in adjusting their respective claims to preferences.[1] And all creditors are sometimes permitted to come in and have their rights determined in the original attachment suit, and share *pro rata* in the distribution of the defendant's property,[2] on the principle that the defendant's goods are in legal custody for the benefit of all the creditors.[3] But this is generally known as "intervention," and will be considered in the next succeeding chapter.[4]

§ 403. **No priorities in some states at same term of court.** —The present law not favoring priorities, but favoring an equal distribution between all the creditors, has led to the enactment of statutes in some states prescribing that creditors who obtain judgment at the same term of court shall share equally in the distribution of the proceeds of the defendant's property liable to execution, if the same is not sufficient to satisfy them all in full;[5] or that creditors attaching the same property who obtained judgments thereon at the same term of court must share *pro rata* in the proceeds of such property. Or where the attachment writs are returnable at the same term of court, whether all obtained judgments at the same or different terms thereof.[6] In such cases the liens of the various creditors relate back to the time of the first attachment, and all are entitled to share uniformly in the proceeds.[7] But the dismissal of the first attachment destroys the lien, although it be done at the instigation of a judgment creditor for the purpose of preventing such *pro rata* distribution.[8]

1. Peirce *v.* Partridge, 3 Metc. (Mass.) 44.

2. Henderson *v.* Bliss, 8 Ind. 100; Schmidt *v.* Colley, 29 Ind. 120; Ryan *v.* Burkam, 42 Ind. 507; Speyer *v.* Ihmels, 21 Cal. 280.

3. Plunkett *v.* Moore, 4 Harr. (Del.) 379.

4. *Post*, § 426.

5. Post *v.* Carpenter, 3 Fla. 1; Smith *v.* Bowden, 23 Fla. 150, 1 So. Rep. 314; Porter *v.* Earthman, 4 Yerger (Tenn.) 358; Freeman *v.* Grist, 1 Dev. & B. (N. C.) 217.

6. Pollack *v.* Slack, 92 Ill. 221; Mechanics' Sav. Inst. *v.* Givens, 82 Ill. 157; Daniels *v.* Lewis, 7 Col. 430; Maloney *v.* Grimes, 1 Col. T. 111.

7. Smith *v.* Clinton Bridge Co., 13 Ill. App. 572.

8. And if such judgment creditor levied his execution after the first (his) attachment and before the levy of the second attachment, and the

§ 404. General rules—First valid levy takes prior lien.—The general rule regarding the priority of attachments, however, based upon the principle that the lien takes effect at the time of the levy and not at the time of the return or judgment,[1] is, that an attachment creates a lien which nothing subsequent can destroy but the dissolution of the attachment upon the conditions prescribed by law,[2] and that the attachment first levied or the summons of garnishment first served shall be first satisfied out of the proceeds of the things or credits so actually attached.[3] Their precedence is first determined primarily by the time of actual service, as shown by the returns of the officers on the writs,[4] and without reference to the time of judgment, executions or sales.[5] This is true where the levy is good and

second attachment is prosecuted to judgment at a subsequent term, the lien of the execution is superior to that of the second attachment and judgment. Paltzer *v.* National Bank, 145 Ill. 177, 34 N. E. Rep. 34.

Where the attachment fails to hold the property, or where judgment is not obtained at the same term of court, the statute in regard to *pro rata* division of proceeds does not apply. Kennedy *v.* Wikoff, 21 Ill. App. 277.

Nor is, in Illinois, a creditor who recovers in a garnishment proceeding required to share the proceeds *pro rata*, such proceedings not being included within the particular statute. Kennedy *v.* Wikoff, 21 Ill. App. 277.

1. Morehead *v.* Western North Carolina R. R. Co., 96 N. C. 362; Rowan *v.* Lamb, 4 G. Greene (Iowa) 468.

2. Goore *v.* McDaniel, 1 M'Cord (S. C.) 480; *ante*, § 326.

3. Carter *v.* Champion, 8 Conn. 549; Beers *v.* Place, 36 Conn. 578; Patrick *v.* Montader, 13 Cal. 434; Willis *v.* Parsons, 13 Ga. 335; Sewell *v.* Savage, 1 B. Mon. (Ky.) 260; Kennon *v.* Ficklin, 6 B. Mon. (Ky.) 414; Clay *v.* Scott, 7 B. Mon. (Ky.) 554; Wallace *v.* Forrest, 2 Har. & M. (Md.) 261; Talbot *v.* Harding, 10 Mo. 350; Yale *v.* Matthews, 12 Abb. (N. Y.) Pr. 379; 20 How. Pr. (N. Y.) 430; Callahan *v.* Hallowell, 2 Bay (S. C.) 8; Farmers' Bank *v.* Day, 6 Gratt. (Va.) 360; Roberts *v.* Dunn, 71 Ill. 46; Laird *v.* Dickerson, 40 Iowa 665; Nutter *v.* Connet, 3 B. Mon. (Ky.) 199; Harmon *v.* Juge, 6 La. Ann. 768; Cole *v.* Butler, 43 Me. 401; Bruce *v.* Holden, 21 Pick. (Mass.) 187; Burlingame *v.* Bell, 16 Mass. 318; Platt *v.* Brown, 16 Pick. (Mass.) 553; Rockwood *v.* Varnum, 17 Pick. (Mass.) 289; Liebman *v.* Ashbacker, 36 Ohio St. 94; Crowninshield *v.* Strobel, 2 Brev. (S. C.) 80; English *v.* King, 10 Heisk. (Tenn.) 666; Rudd *v.* Paine, 2 Cranch C. Ct. 9; Grigsby *v.* Love, 2 Cranch C. Ct. 413; McCobb *v.* Tyler, 2 Cranch C. Ct. 199; Johnson *v.* Griffith, 2 Cranch C. Ct. 199. But compare Violette *v.* Tyler, 2 Cranch C. Ct. 200; McLaughlin *v.* Swann, 18 How. 217; Wooldridge *v.* Mississippi Val. Bank, 36 Fed. Rep. 97.

4. Gates *v.* Bushnell, 9 Conn. 530.

5. DeWolf *v.* Murphy, 11 R. I. 630.

Since priority depends upon prior attachment and not upon prior judg-

the return sufficient, although the latter be irregular because of lacking the signature of the officer.[1] And although the judgment entry ordering sale omitted to specifically describe the property, such omission does not affect the lien.[2]

Where there have been several attachments, and one of them is dissolved, a junior attachment will take priority.[3] A like effect will be caused by the first attaching creditor waiving his lien. A waiver of lien operates as a dissolution of attachment, and the lien of the next junior attaching creditor will take effect as if the first attachment had not been made.[4]

Furthermore, when the execution issuing on the judgment

ment, other creditors can not complain because the debtor himself advances the hearing of the case. Rawlins *v.* Pratt, 45 La. Ann. 58, 12 So. Rep. 197; Mutual Nat. Bank *v.* Pratt, 45 La. Ann. 58, 12 So. Rep. 197; Smith *v.* Pratt, 45 La. Ann. 58, 12 So. Rep. 197; Chaffe *v.* Pratt, 45 La. Ann. 58, 12 So. Rep. 197.

When is an attachment suit begun?— It was said in a case where a suit was begun in the name of the payees of notes, without their knowledge, by attorneys acting for their sureties, that other attaching creditors, coming in before the payees ratified the first attachment, should take precedence; because the first attachment was not the suit of the payees until they assented to it. Caruth-Byrnes Hardware Co. *v.* Deere, 53 Ark. 140, 13 S. W. Rep. 517.

1. Lea *v.* Maxwell, 1 Head (Tenn.) 365.

2. Gerdes *v.* Sears, 13 Ore. 358.

The levy must be actual and not a mere pretense. Therefore, where one officer unlocked a carriage house for the purpose of attaching a carriage, and another officer first laid hands upon the carriage, the latter was held to have obtained a prior lien. Hollister *v.* Goodale, 8 Conn. 332; *ante*, § 207.

3. Bachelder *v.* Perley, 53 Me. 414; Haebler *v.* Myers, 11 N. Y. S. 7, 312, s. c. 58 Hun (N. Y.) 179.

If the first attachment is invalid, the filing of a *lis pendens* in such suit will create no priority over subsequent valid attachments. Meyer *v.* Ruff, (Ky.) 16 S. W. Rep. 84; Meyer *v.* Krauth, (Ky.) 16 S. W. Rep. 84; Meyer *v.* Layers, (Ky.) 16 S. W. Rep. 84; Meyer *v.* Feuchtwanger, (Ky.) 16 S. Rep. 84.

If, however, the first should be revived, or its dissolution reversed on appeal, any proceeds paid to the second attaching creditor in the interval may be recovered from him in an action for money had and received. Caperton *v.* M'Corkle, 5 Gratt. (Va.) 177.

A debtor's property was attached. He claimed it as exempt. The officer then attached it on a second creditor's writ against which there was no exemption. The officer did not part with the possession first taken. The debtor's claim of exemption was then waived, and it was held that the lien of the first attachment thereby became superior to that of the second. Wallace *v.* Swan, 6 Dak. 220, 50 N. W. Rep. 624.

4. Gilbert *v.* Gilbert, 33 Mo. App. 259.

obtained in the first attachment is satisfied out of the sale of the goods without exhausting the proceeds, the second attachment then becomes a lien on the residue.[1] The lien of the first attachment can not be greater than the indebtedness stated in the affidavit and writ.[2] When the property is sold by the sheriff, the proceeds take the place of the property in the attachment suit, and though it is sold to satisfy an attachment which is a lien for less than its value, and a second attachment exists, the purchaser of it takes good title. He may pay the full price in money to the officer whose duty it is to satisfy the execution and hold the balance of the money subject to the lien of the second attachment.[3]

The rule applies whether the writs have all been issued from a state court or whether some have been issued from a state court and some from a United States court. The writ under which the property is first seized and taken into actual custody has priority.[4]

§ 405. Exceptions to the rule.—While there is no priority given to writs issuing from a United States court over those issued from a state court, yet a preference is given to the United States as a creditor, and an attachment of goods by a United States marshal to collect a claim of the United States

1. Hanauer *v.* Casey, 26 Ark. 352.

2. Tilton *v.* Cofield, 2 Col. 392.

If other demands are afterwards introduced, the attachment will not be good against subsequent attaching creditors. Fairbanks *v.* Stanley, 18 Me. 296.

Mere irregularities will not defeat prior lien.—Subsequent attaching creditors can not defeat the lien of a prior attachment by showing that no bond can be found in the clerk's office. It will be presumed that the officer allowing the writ did his duty, and that the bond was filed and has been lost, unless the contrary be shown by positive evidence. Kincaid *v.* Neall, 3 M'Cord (S. C.) 201. Mere irregularities may be amended and the priority of liens thereby preserved. *Post*, § 406.

3. Tilton *v.* Cofield, 2 Col. 392; Thurman *v.* Blankenship-Blake Co., 79 Tex. 171, 15 S. W. Rep. 387.

4. Adler *v.* Roth, 2 McCrary 445, 5 Fed. Rep. 895; Hagan *v.* Lucas, 10 Peters (U. S.) 400; Taylor *v.* Carryl, 24 Pa. St. 259, s. c. 20 How. (U. S.) 583.

But where there is no priority between writs issuing from different jurisdictions no money can be collected on either, on account of the conflict which would arise between the different courts. Hagan *v.* Lucas, 10 Peters (U. S.) 400,

will precede an attachment theretofore made by a state officer; and this by virtue of the priority given by the United States, provided the defendant be insolvent, and the same be recognized by the laws of the state, otherwise the prior attachment will prevail.[1] Likewise the United States may have a paramount lien upon the assets of a banking association to reimburse the United States for any amount expended in paying the circulating notes of such bank.[2]

Some liens also are by state statute made paramount to others and are enforcible by attachment. For example, an attachment under a log lien act may take precedence over a prior attachment of logs or lumber under the general attachment act.[3]

Certain acts of the creditor may operate to postpone his lien to that of a subsequent attaching creditor. Although such acts may not have been intended to be a waiver, yet they may act by way of estoppel because of the creditor's effort to take some undue advantage, or his negligence to enforce his legal rights. Where an attaching creditor attempts by other means to secure the debt another creditor who has actually attached will obtain a preference.[4] If a prior execution creditor makes an arrangement with the sheriff, whereby goods in his possession by attachment are sold at private sale, he thereby postpones his lien to that of a subsequent attaching creditor.[5] And where a creditor, when placing the writ of attachment in the hands of an officer, tells the officer not to serve it unless some other person gets out an attachment, another writ placed in the officer's hands before he is otherwise instructed by the first creditor, will secure a prior lien.[6]

The claim of a partnership creditor takes precedence over the claim of a creditor of an individual member of a co-

1. Greenough *v.* Walker, 5 Mass. 214; Watson *v.* Todd, 5 Mass. 271; Bartlet *v.* Prince, 9 Mass. 431.

2. 13 U. S. Stat. at L. 99; Schmidt *v.* First Nat. Bank, 22 La. Ann. 314.

3. Halpin *v.* Hall, 42 Wis. 176.

4. Sullivan *v.* Cleveland, 62 Tex. 677.

5. Culver *v.* Rumsey, 6 Ill. App. 598.

6. Florsheim Bros. Dry Goods Co. *v.* Geo. Taylor Commission Co., (Ark.) 27 S. W. Rep. 79.

partnership. Therefore an attachment of the goods of a partnership by a creditor of one of the partners is not valid as against another attachment of the same goods by a partnership creditor.[1]

In the settlement of the debts of a corporation, a proceeding for the benefit of all the creditors will take precedence over an attachment instituted for the benefit of a particular creditor.[2]

§ 406. **Amended irregularity preserves priority.**—The amendment of a mere irregularity in attachment proceedings relates back to the beginning thereof,[3] and preserves the priority of the attachment over other liens, which took effect before the amendment, but after the original attachment.[4] When the rights and liberties of the parties are in no manner changed or affected, except merely in regard to want of form, which our statute of Jeofails is made to cure and guard against, the lien is preserved;[5] but an amendment which diminishes or de-

1. Pierce *v.* Jackson, 6 Mass. 242; Moody *v.* Lucier, 62 N. H. 584; Houghton *v.* Davenport, 74 Me. 590; Crooker *v.* Crooker, 46 Me. 250; Cunningham *v.* Gushee, 73 Me. 417; Abels *v.* Westervelt, 15 Abb. (N. Y.) Pr. 230, 24 How. (N. Y.) Pr. 284.

Partnership property held in trust to pay certain creditors can not be affected by process of garnishment against the trustee at suit of a creditor of one of the partners. Robinson *v.* Tevis, 38 Cal. 611.

2. Atlas Bank *v.* Nahant Bank, 23 Pick. (Mass.) 480.

3. *Ante*, § 152, "Amendment of the Affidavit;" § 180, "Effect of the Amendment of the Bond;" § 197, "Amendment of the Writ;" § 222, "Amendment of the Service of the Writ;" § 242, "Effect of the Amendment of the Return."

4. Putnam *v.* Hall, 3 Pick. (Mass.) 445; Cutler *v.* Lang, 30 Fed. Rep. 173; Wentworth *v.* Sawyer, 76 Me. 434; Henderson *v.* Stetter, 31 Kan. 56; Schneider *v.* Roe, (Tex. Civ. App.) 25 S. W. Rep. 58; McCarn *v.* Rivers, 7 Iowa 404; Cain *v.* Rockwell, 132 Mass. 193; Wright *v.* Herrick, 125 Mass. 154. Wright *v.* Hale, 2 Cush. (Mass.) 486; Cook *v.* New York Corundrum Min. Co., 114 N. C. 617, 19 S. E. Rep. 664.

5. Ball *v.* Claflin, 5 Pick. (Mass.) 303.

The priority of an attachment is not destroyed by amending an affidavit which fails to state how the debt arose. Cook *v.* New York Corundrum Min. Co., 114 N. C. 617, 19 S. E. Rep. 664.

Nor by striking out one letter in the name of the party to the proceeding. Wright *v.* Hale, 2 Cush. (Mass.) 486; Wentworth *v.* Sawyer, 76 Me. 434.

Nor by changing the name "Mary Cain" to "Ann Cain." Cain *v.* Rockwell, 132 Mass. 193.

Nor by making the words "doing business under the name of H" read

stroys the rights of third parties who are interested in the result of the issue, will destroy the priority,[1] and let in a junior attaching creditor. Amending the proceedings by the introduction of a new cause of action, or which would have enlarged the amount of damages recoverable, generally discharges the attachment as to other attaching creditors.[2] But it has also been said that the mere fact of the prior attaching creditor introducing an item which is a valid claim against the debtor does not make the first attachment, as a whole, fail against the subsequent attachment as it would in the case of a claim partly fraudulent.[3] And also that if the creditor directs the sheriff to levy only for the original amount claimed, the attachment will be preserved as against the junior attaching creditors.[4] The Statute of Amendments will not permit an alteration which varies the ground of action and introduces a new party to the record.[5] All subsequent attaching creditors have a vested right to the excess beyond the amount of the judgment to be rendered upon the writ of the first attaching creditor, as it was when served.[6] The rights of attaching creditors, who, as against their common debtor, have equal claims to the satisfaction of

"copartners doing business under the name of H." Cutler *v.* Lang, 30 Fed. Rep. 173.

Nor by introducing the name of one member of the firm when the same had been omitted. Henderson *v.* Stetter, 31 Kan. 56.

Nor by setting out copies of the assignment of a note and account on which the suit was brought. McCarn *v.* Rivers, 7 Iowa 404.

Nor by correcting a mistake in his writ. Putnam *v.* Hall, 3 Pick. (Mass.) 445.

1. Moore *v.* Graham, 58 Mich. 25; Laighton *v.* Lord, 9 Foster (N. H.) 237.

2. Young *v.* Broadbent, 23 Iowa 539; Bauer *v.* Deane, 33 Neb. 487, 50 N. W. Rep. 431; Fairbanks *v.* Stanley, 18 Me. 296; Peirce *v.* Partridge, 3 Metc. (Mass.) 44; Danielson *v.* Andrews, 1 Pick. (Mass.) 156; Parks *v.* Young, 75 Tex. 278.

Filing a new count, which does not appear by the record to be for the same cause of action as the original declaration, vacates the attachment. In this case the money counts only were first included and a count on a promissory note was afterwards filed. Fairfield *v.* Baldwin, 12 Pick. (Mass.) 388.

3. Schneider *v.* Roe, (Tex. Civ. App.) 25 S. W. Rep. 58.

4. Cutler *v.* Lang, 30 Fed. Rep. 173.

5. A writ against the copartnership H. & R., amended so as to make it a writ against H., in his individual capacity, dissolved the lien created by it. Peck *v.* Sill, 3 Conn. 157.

6. Willis *v.* Crooker, 1 Pick. (Mass.) 204.

their respective demands, depend upon strict law, and, if one of them loses a priority once acquired, it can not be restored by amendment.[1] In New Hampshire, which state allows less latitude in this regard than most other states, a defective service in attachment, although cured by an additional service, will leave the attaching creditor's right subordinate to that of one who attaches the same property between the two services.[2]

§ 407. **Stay of proceedings preserves priority.**—The stay of proceedings for a specified time by an agreement between the plaintiff and the defendant after judgment will preserve the lien on real estate for such time.[3] And the priority of an attachment is not lost, but may be enforced, although an order is made in pursuance of an insolvent debtor's act staying proceedings against the debtor.[4]

§ 408. **Successive attachments—Rule.**—It is an almost universal rule that when personal property is seized on attachment or execution by one officer, or it is taken into his custody and control constructively by some of the means known to the law, it is in custody of law and can not thereafter be seized on execution or attachment by another officer, whether the writs issue from the same or different courts.[5] Nevertheless, successive liens may be created in favor of subsequent attaching creditors. The officer is frequently proceeded against as a

1. Kittredge *v.* Gifford, 62 N. H. 134.

2. Kittredge *v.* Gifford, 62 N. H. 134.

3. Love *v.* Harper, 4 Humph. (Tenn.) 113.

4. Berryman *v.* Stern, 14 Nev. 415.

5. Robinson *v.* Ensign, 6 Gray (Mass.) 300; Watson *v.* Todd, 5 Mass. 271; Bailey *v.* Childs, 46 Ohio St. 557; Odiorne *v.* Colley, 2 N. H. 66; Burrell *v.* Letson, 1 Strob. L. (S. C.) 239; Crane *v.* Freese, 16 N. J. L. 305; Conover *v.* Ruckman, 32 N. J. Eq. 685; West River Bank *v.* Gorham, 38 Vt. 649; Coffrin *v.* Smith, 51 Vt. 140; Corning *v.* Dreyfus, 20 Fed. Rep. 426; Blair *v.* Cantey, 2 Speer L. (S. C.) 34.

If property be sold to satisfy a second attachment issuing out of a different court, the sheriff is liable to the first attaching creditor for the amount of his judgment, or for the amount of the proceeds if less than the amount of the judgment, although such officer may have paid the same to the second attaching creditor. Weaver *v.* Wood, 49 Cal. 297.

Furthermore, the act of the second attaching officer will be a trespass upon the rights of the first for which the latter may maintain an action,

garnishee.[1] But the most general rule requires that all subsequent writs, to be levied on personal property, whether issuing from the same or different courts, shall be placed in the hands of the officer making the first attachment, to be by him served by making a return thereon in the order in which they are delivered to him, in which order successively they take effect as liens upon the residue of the personal property (or proceeds thereof), after satisfying the earlier writ or writs by him served.[2] They take precedence according to the time they were placed in the hands of an officer *who already holds under a prior attachment*, and not according to the order in which he levies them.[3] And notwithstanding that judgment on a junior attachment may be entered before judgment is rendered on the senior writ.[4]

though it is not an act of which the owner can complain. Brown *v.* Crockett, 22 Me. 537. *Ante*, § 243, "Possession by the Sheriff," and § 384, "Liability of the Executive Officer."

1. Locke *v.* Butler, 19 Ohio St. 587; Bailey *v.* Childs, 46 Ohio St. 557; Odiorne *v.* Colley, 2 N. H. 66; Burrell *v.* Letson, 1 Strob. L. (S. C.) 239; Crane *v.* Freese, 16 N. J. L. 305; Hall *v.* Walbridge, 2 Aikens (Vt.) 215. *Post*, Vol. II, "Garnishment."

A *quasi* levy has, in some states, been permitted by an executive officer, but he was not permitted to take the property out of the possession of the first. The officer holding under the prior writ was treated in law as the custodian of the officer making the second or subsequent attachment as to any surplus that might remain from the sale of the property, or as to the residue of the goods in his hands after selling sufficient to satisfy the prior lien. Harbison *v.* McCartney, 1 Grant. (Pa.) 172; Burroughs *v.* Wright, 16 Vt. 619; Benson *v.* Berry, 55 Barb. (N. Y.) 620; White *v.* Cutler, 12 Ill. App. 38.

2. Simon *v.* Adler-Goldman Com. Co., 56 Ark. 292, 19 S. W. Rep. 921; Weaver *v.* Wood, 49 Cal. 297; Larabee *v.* Parks, 43 Kan. 436, 23 Pac. Rep. 598; May *v.* Buckhannon River Lumber Co., 70 Md. 448, 17 Atl. Rep. 274; Turner *v.* Austin, 16 Mass. 181; State *v.* Harrington, 28 Mo. App. 287; Merrill *v.* Wedgwood, 25 Neb. 283, 41 N. W. Rep. 149; Pach *v.* Gilbert, 124 N. Y. 612, 27 N. E. Rep. 391; Callahan *v.* Hallowell, 2 Bay (S. C.) 8; Corning *v.* Dreyfus, 20 Fed. Rep. 426.

3. Larabee *v.* Parks, 43 Kan. 436, 23 Pac. Rep. 598; Simon *v.* Adler-Goldman Com. Co., 56 Ark. 292, 19 S. W. Rep. 921.

4. Weaver *v.* Wood, 49 Cal. 297.

Such is the order of preference, and a warrant of attachment which is vacated by an order of court, but afterwards reinstated by an order setting aside the order of vacation, takes precedence of executions levied after the order vacating the attachment, but prior to the order setting aside the order of vacation. And the proceeds of the property sold under such executions should be first applied to satisfy the attachment. Pach *v.* Gilbert, 124 N. Y. 612, 27 N. E. Rep. 391.

Where, however, the first attachment is dismissed for any cause,[1] the subsequent attachments must hold upon their own merits. If the subsequent attaching creditors have perfected their liens by taking judgment, the next one in order will be entitled to be first satisfied out of the attached property, and although the property may have been previously sold under the former attachment, the purchaser's title will not be good as against the subsequent attaching creditors.[2] But if after the first levy the property is taken from the possession of the officer in an action of replevin, and he receives other writs of attachment no lien will be created on the property thereby. The property must be in his possession on attachment for subsequent writs to take effect without some overt act on his part.[3] Furthermore, when an officer levies a second writ of attachment on property then held by him under a prior attachment, he only attaches the interest of the defendant of the property then in his possession.[4]

Rule regarding successive levies by deputy officers.—The rule regarding successive attachments, though simple in itself, may become complex because of the confusion arising when the attachments are made by different deputies of the same officer. In the older states deputies, of the same officer, have been considered, for the purpose of serving writs, as distinct officers in themselves, and one has not been permitted to attach personal property which has been theretofore seized and is in the possession of another deputy.[5] But in some of the newer states their acts are being treated as the acts of the sheriff himself,

1. *Ante*, § 326.

2. Brandon Iron Co. *v.* Gleason, 24 Vt. 228.

3. Merrill *v.* Wedgwood, 25 Neb. 283, 41 N. W. Rep. 149.

4. O'Connor *v.* Blake, 29 Cal. 312.

5. Vinton *v.* Bradford, 13 Mass. 114; Thompson *v.* Marsh, 14 Mass. 269; Strout *v.* Bradbury, 5 Greenl. (Me.) 313; Walker *v.* Foxcroft, 2 Me. 270; Moore *v.* Graves, 3 N. H. 408.

In Washington, likewise, it has been held that where a writ was placed by one creditor in the hands of a sheriff, and a writ by another creditor subsequently in the hands of a deputy sheriff who first took possession of the property, the attachment levied by the deputy took priority. Meacham Arms Co. *v.* Strong, 3 Wash. T. 61, 13 Pac. Rep. 245.

and their writs permitted to take priority as they would if they had been successively delivered to him.[1] And the same principle is applied as between a deputy and the sheriff himself.[2]

Successive levies on real estate.—The rule regarding successive attachments on real estate is founded on an altogether different principle than that regarding attachment on personal property. This is because the officer making an attachment upon real estate takes no possession or right of possession of the land, but simply fixes a lien thereon of record; and successive attachments may thereafter be placed upon it by the same or another officer, subject, however, to the equity of all prior attachments. But a prior attachment on land must have been properly made, or it will not prevail against a subsequent valid attachment.[3]

When several writs of attachment to be levied upon land are delivered to an officer, they are entitled to priority in the order in which they are delivered to him, the rule being the same in this regard as that pertaining to personal property.[4] But this rule more particularly applies to what is generally known as "Simultaneous Attachments."[5]

1. Claflin *v.* Furstenheim, 49 Ark. 302, 5 S. W. Rep. 291; Heye *v.* Moody, 67 Tex. 615, 4 S. W. Rep. 242; State *v.* Harrington, 28 Mo. App. 287.

And the efforts of deputies of the same sheriffs to secure priority can effect nothing on the grounds of superior diligence. State *v.* Harrington, 28 Mo. App. 287.

Rule in Kentucky.—It is said in Kentucky that where writs are in the hands of different deputies of the same sheriff against the same defendant, the proceeds should be applied to that writ first in the hands of either. Kennon *v.* Ficklin, 6 B. Mon. (Ky.) 414. And where the order of service may have been reversed without fault, the chancellor having the funds in his hands under all the attachments will distribute it according to the rule which should have governed the execution of the process. Clay *v.* Scott, 7 B. Mon. (Ky.) 554.

2. Heye *v.* Moody, 67 Tex. 615, 4 S. W. Rep. 242.

3. Oldham *v.* Scrivener, 3 B. Mon. (Ky.) 579; Kittredge *v.* Bellows, 7 N. H. 399; Norton *v.* Babcock, 2 Metc. (Mass.) 510.

4. Van Camp *v.* Searle, (Sup.) 29 N. Y. S. 757.

5. *Post*, § 409.

Where a sheriff had two writs of attachment delivered to him in succession, on the first of which he made a return that he had attached the real and personal property, it was held that the returns were conclusive and gave to the latter attachment priority over the former. Learned *v.* Vandenburgh, 7 How. (N. Y.) Pr. 379, 8 How. (N. Y.) Pr. 77.

§ 409. **Simultaneous attachment — Rule.** — When several writs for service against the same property are simultaneously placed into the hands of the same officer for attachment, or where several attachments are simultaneously placed on the same property, they each take an equal interest therein on the principle that each creditor by his attachment obtains a lien on the property in security of the debt which would be valid for the whole but for the attachment of the others. Neither can claim priority, but will share equally in the proceeds according to the number of units. They each take an aliquot part of the proceeds of the goods so attached. They hold not in shares or proportions, but *per mie et per trust*, and upon division neither can appropriate to himself more than a moiety.[1] But if the claim of one is less than the aliquot part of the proceeds, they will then take dollar for dollar until the smaller claim is satisfied, and the residue will be applied to the satisfaction of the greater claim.[2]

In general the law admits of no fraction of a day and this principle is adhered to by some states when attachments are levied at different hours of the same day.[3] But others and a greater number maintain that an attachment fixes a lien according to the actual time of service and takes into consideration the more minute measurements of time.[4] Pennsylvania does not regard the fraction of a day in the case of foreign attach-

1. Rockwood *v.* Varnum, 17 Pick. (Mass.) 289; Sigourney *v.* Eaton, 14 Pick. (Mass.) 414; Thurston *v.* Huntington, 17 N. H. 438; Nutter *v.* Connet, 3 B. Mon. (Ky.) 199; Wilson *v.* Blake, 53 Vt. 305. Compare Hill *v.* Child, 3 Dev. (N. C.) 265.

2. Campbell *v.* Ruger, 1 Cowen (N. Y.) 215; Jones *v.* Hutchinson, 43 Ala. 721.

A contract made between themselves as to the division of the property will be founded on a good consideration and binding on them. It will estop either from thereafter raising the question of priority. Lyman *v.* Dow, 25 Vt. 405.

3. Thurston *v.* Huntington, 17 N. H. 438; Nutter *v.* Connet, 3 B. Mon. (Ky.) 199; Steffens *v.* Wanboeker, 17 S. C. 475.

4. Fairfield *v.* Paine, 23 Me. 498; Garity *v.* Gigie, 130 Mass. 184; Ginsberg *v.* Pohl, 35 Md. 505; Dyer *v.* Mears, 2 B. Mon. (Ky.) 528; Sewell *v.* Savage, 1 B. Mon. (Ky.) 260; Gomila *v.* Milliken, 41 La. Ann. 116, 5 So. Rep. 548; Tufts *v.* Carradine, 3 La. Ann. 430; Beck *v.* Brady, 7 La. Ann. 1; Stone *v.* Abbott, 3 Baxter (Tenn.) 319; Claiborne *v.* Stewart, 4 Baxter (Tenn.) 206.

ments, but when domestic attachments are made on the same day the one made at the earlier hour will prevail.[1] The officer may, if he see fit, indicate by his return the order in which the writs were by him served, and may return one as subject to another and thereby give them their rightful precedence.[2] Where one writ is returned as attached at a certain hour of the day and the other is returned as levied upon that day without specifying any particular hour, priority will be given to the one stating the particular hour. No amendment will be permitted to the other.[3] But if there is nothing in the officer's return or on the face of the proceedings to show which was first served on the day stated, it may be presumed that they were all served at the same time.[4] And as a general rule where there is nothing to indicate which was first levied parol evidence may be introduced for that purpose in furtherance of justice and will be considered as entirely consistent with the return.[5]

The same rule which governs the simultaneous attachment of personal property governs the simultaneous attachment of land. Each will take a moiety of the land as a tenant in common with the other;[6] that is each will take in equal proportions until the smaller debt is satisfied. No one can take a moiety greater than the amount necessary to satisfy his debt.[7]

§ 410. **Fraudulent attachment.**—It is a well established and well known principle of law that no property passes by fraud. And it is only a modification of this principle that no lien can be acquired upon property by means of fraud. The application of this rule is well known in regard to mortgage liens and we may affirm that attachment liens are governed by the same

1. Jones *v.* Bonsall, 11 Phila. (Pa.) 561; Bradley's Appeal, 89 Pa. St. 514; Yelverton *v.* Burton, 26 Pa. St. 351; Long's Appeal, 23 Pa. St. 297.
2. Thurston *v.* Huntington, 17 N.H. 438.
3. Fairfield *v.* Paine, 23 Me. 498; Taylor *v.* Emery, 16 N. H. 359. See Bissell *v.* Nooney, 33 Conn. 411.
4. Ginsberg *v.* Pohl, 35 Md. 505.
5. Brainard *v.* Bushnell, 11 Conn. 16.
6. Shove *v.* Dow, 13 Mass. 529.
7. Durant *v.* Johnson, 19 Pick. (Mass.) 544.

rule.[1] A debtor may have a perfect right to prefer one of his creditors to another, but he can not do so by procuring the favored one to issue an attachment against his property where there was no ground for such attachment.[2] Suing out an attachment upon a fictitious debt for the purpose of placing the assets of an insolvent debtor beyond the reach of his creditors, is a gross outrage upon the rights of the latter for the prevention of which the courts will interfere. And although it should be made to appear that while the attachment was illegal in part, yet it was as to the other part right and proper, such attachment will nevertheless be wholly void as against a subsequent valid attaching creditor.[3]

1. Peters *v.* Conway, 4 Bush. (Ky.) 565.

And a subsequent attaching creditor has the same right that a junior mortgagee has to redeem property from a prior lien for the purpose of making his own lien valuable to himself. Chandler *v.* Dyer, 37 Vt. 345.

2. Freiberg *v.* Freiberg, 74 Tex. 122, 19 S. W. Rep. 791.

The lien of attachment will not be postponed where it is shown that the debts sued for were *bona fide;* that the attachments were not sued out for the benefit of the debtor or to aid in hindering and defrauding other creditors and that the only object of the attaching creditor was to get a preference for himself. Claflin *v.* Sylvester, 99 Mo. 276, 12 S. W. Rep. 508; Yates *v.* Dodge, 123 Ill. 50.

3. Thompson *v.* Rose, 16 Conn. 71; Zadick *v.* Schafer, 77 Tex. 501; Freiberg *v.* Freiberg, 74 Tex. 122; Harding *v.* Harding, 25 Vt. 487; Murray *v.* Eldridge, 2 Vt. 388; Moore *v.* Stege, 93 Ky. 27, 18 S. W. Rep. 1019; Fairfield *v.* Baldwin, 12 Pick. (Mass.) 388; Adams *v.* Paige, 7 Pick. (Mass.) 542; Pierce *v.* Jackson, 6 Mass. 242; Whittier *v.* Smith, 11 Mass. 211.

Where a debtor writes to certain friends and creditors of his embarrassed condition, telling them if they wish to attach his property it would be all right, as he was thinking of making an assignment for the benefit of his creditors, it was held to be such collusion as to invalidate, because of such fraud, the attachment they thereafter made. Moore *v.* Stege, 93 Ky. 27, 18 S. W. Rep. 1019.

Knowingly trying to enforce a claim larger than the amount that is really due, is fraudulent as against a subsequent attaching creditor whose claim is honest and will defeat the prior attachments *in toto* as against the latter. Freiberg *v.* Freiberg, 74 Tex. 122.

But when the same is done in good faith, the mere fact of stating an account for a greater sum than is actually due is not fraud. Such attachment will be valid, even against subsequent attaching creditors to the extent of the amount actually due. Mendes *v.* Freiters, 16 Nev. 388.

Taking judgment on a writ of attachment by agreement with the debtor, at any other time than that set in the writ, is a forfeiture of the attachment lien as to a subsequent attaching creditor. Murray *v.* Eldridge, 2 Vt. 388.

Intermingling the goods, a fraud.—

Fraud is dependent upon intent.—To constitute fraud in attachments, like in any other proceeding, the act must be done with the evil intention to injure the rights of other creditors. Where such evil intent exists, as where an attachment is sued out on grounds known to be false by the attaching creditor when he makes his affidavit for attachment, his lien will be postponed to the lien of a subsequent attachment obtained in good faith on the same property by another creditor.[1]

§ 411. **Junior attaching creditors' remedies.**—*The second attacher may sometimes intervene in the same suit.*—In some states the subsequent attaching creditor is by statute or practice permitted to intervene and defend in the attachment suit of the first creditor and contest the fraud in that way.[1] In a state

The doctrine of confusion of goods, derived from the civil law, is applied to attachments, and one who by purchase or otherwise acquires goods fraudulently confused, has nought but the naked possession, which gives no right as against subsequent attaching creditors. Treat *v.* Barber, 7 Conn. 274; Shumway *v.* Rutter, 8 Pick. (Mass.) 443; Weil *v.* Silverstone, 6 Bush. (Ky.) 698; Parmele *v.* McLaughlin, 9 La. 436.

Fraudulent attacher liable in damages.—Where an attachment is caused to be sued out upon a fictitious debt for the fraudulent purpose of defeating the rights of other creditors, the parties implicated in the fraud will also be wrong-doers in such a sense that they may be made to respond in damages for the injury sustained. Adams *v.* Paige, 7 Pick. (Mass.) 542; Zadick *v.* Schafer, 77 Tex. 501; Denny *v.* Warren, 16 Mass. 420.

1. Kollette *v.* Seibel, (Tex.Civ.App.) 26 S. W. Rep. 863.

An agreement between an attachment plaintiff and defendant, that the latter withdraw his plea in abatement, and consent to a judgment, will not postpone the attachment lien to that acquired by subsequent attachments, although the agreement be made in consideration of money paid, if in fact it was not made with fraudulent intent. Adler *v.* Anderson, 42 Mo. App. 189.

2. Harding *v.* Harding, 25 Vt. 487; Blaisdell *v.* Ladd, 14 N. H. 129; Lodge *v.* Lodge, 5 Mason (C. C.) 407; Carter *v.* Gregory, 8 Pick. (Mass.) 165; Strong *v.* Wheeler, 5 Pick. (Mass.) 410; Lambert *v.* Craig, 12 Pick. (Mass.) 199; Ludington *v.* Hull, 4 W. Va. 130; Buckman *v.* Buckman, 4 N. H. 319; Jump *v.* Batton's Creditors, 35 Mo. 193; Webster *v.* Harper, 7 N. H. 594; Pike *v.* Pike, 4 Foster (24 N. H.) 384; Kimball *v.* Wellington, 20 N. H. 439; Clough *v.* Curtis, 62 N. H. 409.

In New Hampshire he may intervene and defend in the name of the defendant. Buckman *v.* Buckman, 4 N. H. 419; Pike *v.* Pike, 4 Fost. (24 N. H.) 384; Blaisdell *v.* Ladd, 14 N. H. 129; Kimball *v.* Wellington, 20 N. H. 439; Page *v.* Jewett, 46 N. H. 441. But this he does in the discretion of the court and not in his own right; that is to say not as a matter of

where the only effect of the first attachment is to bring the funds of the debtor into court to be distributed among the several attaching creditors, and the only effect of a judgment in such case is to establish the demand against the debtor, the court of course, has the power, and it is his duty, to inquire into the several causes of action and to prevent fraud and in-

course, but when the facts are shown to require his admission. Clough *v.* Curtis, 62 N. H. 409.

In some states he may do this where the property is attached under a trustee (garnishee) process. Harding *v.* Harding, 25 Vt. 487. And such intervening attaching creditor may resort to grounds of defense which the debtor himself would not be permitted to take. Carter *v.* Gregory, 8 Pick. (Mass.) 165; Strong *v.* Wheeler, 5 Pick. (Mass.) 410; Lambert *v.* Craig, 12 Pick. (Mass.) 199.

In New York the right to move to set aside a previous attachment because of jurisdictional defects therein is said to have existed independent of statute. Jacobs *v.* Hogan, 85 N. Y. 243.

In Texas also the second attaching creditor may intervene for the purpose of showing that the prior attachment was based on a fraudulent demand, or had no existence, or that the grounds averred therefor did not exist, or that the affidavit was false, or that the endorsement purporting to be made first was made last, although he may not do so for the purpose of showing mere irregularities or informalities. Sanger *v.* Trammell, 66 Tex. 361, 1 S. W. Rep. 378; Freiberg *v.* Freiberg, 74 Tex. 122; Bateman *v.* Ramsey, 74 Tex. 589; Johnson *v.* Heidenheimer, 65 Tex. 263; Grabenheimer *v.* Rindscoff, 64 Tex. 49; Nenney *v.* Schluter, 62 Tex. 327.

In Wisconsin, a prior attachment was set aside *on motion* at the instance of a subsequent attaching creditor and for the reason that the affidavit made, and the cause of action averred, were not sufficient under the statute to authorize the issuance of a writ. Hawes *v.* Clement, 64 Wis. 152.

In Ohio, likewise, the junior attaching creditor is not permitted to object because of informalities or irregularities, but he may, at a proper time, and in a proper mode, assert his right as against a prior attaching creditor to be first paid out of the proceeds of the attached property on the ground that there is no authority at law for issuing an attachment on a demand of that nature. Ward *v.* Howard, 12 Ohio St. 158; Seibert *v.* Switzer, 35 Ohio St. 661.

In South Carolina likewise, on motion a judgment in favor of a senior attaching creditor was set aside for want of service. Ferguson *v.* Gilbert, 17 S. C. 26. But not for mere irregularities. Copeland *v.* Piedmont and Arlington Life Ins. Co., 17 S. C. 116; Metts *v.* Piedmont and Arlington Life Ins. Co., 17 S. C. 120.

In Georgia, also, a junior attaching creditor is permitted, and without statutory aid, to come into a court of law on an issue suggesting fraud and have the prior attachment (or judgment in attachment) set aside therefor. Smith *v.* Gettinger, 3 Ga. 140. He may become a party to a money rule against the sheriff by an attaching creditor, and may plead that such creditor has no lien upon the fund in the sheriff's hands because it is the

justice.[1] But the right to intervene will receive consideration in the next succeeding chapter.[2]

The second attacher may only object to defects affecting jurisdiction.—Thus, it may be seen that a subsequent attaching creditor is frequently permitted to object to such matters in a prior attachment as will affect the jurisdiction of the court, but in a very few instances, if any, has he ever been permitted to object to mere irregularities and insufficiencies in the prior proceeding.[3]

proceeds of the sale of his goods. Wynne *v.* Millers, 61 Ga. 343.

And in Virginia, in like manner, a junior attaching creditor may defend by showing that there was no cause of action. McCluny *v.* Jackson, 6 Gratt. (Va.) 96.

But in North Carolina, he can not contest the existence and validity of the debt sued for by the prior attaching creditor. Bank of Fayetteville *v.* Spurling, 7 Jones (N. C.) L. 398.

And in California, Indiana, Mississippi and Michigan when an attachment could not be had upon a demand not due the issuance of an attachment to secure such debt was a fraud upon junior attaching creditors, for which they could have the prior attachment dismissed. Davis *v.* Eppinger, 18 Cal. 378; Patrick *v.* Montader, 13 Cal. 434; United States Express Co. *v.* Lucas, 36 Ind. 361; Lytle *v.* Lytle, 37 Ind. 281; Henderson *v.* Thornton, 37 Miss. 448; Hale *v.* Chandler, 3 Mich. 531.

1. Walker *v.* Roberts, 4 Rich. L. (S. C.) 561.

2. *Post*, § 427.

3. *In re* Griswold, 13 Barb. (N. Y.) 412; Isham *v.* Ketchum, 46 Barb. (N. Y.) 43; Seibert *v.* Switzer, 35 Ohio St. 661; Ward *v.* Howard, 12 Ohio St. 158; Freiberg *v.* Freiberg, 64 Tex. 122; Sanger *v.* Trammell, 66 Tex. 361, 1 S. W. Rep. 378; Bateman *v.* Ramsey, 74 Tex. 589; Johnson *v.* Heidenheimer, 65 Tex. 263; Grabenheimer *v.* Rindscoff, 64 Tex. 49; Nenney *v.* Schluter, 62 Tex. 327; Rudolf *v.* McDonald, 6 Neb. 163; Fridenberg *v.* Pierson, 18 Cal. 152; Harvey *v.* Foster, 64 Cal. 296.

It is a well established doctrine that mere errors and irregularities in judicial actions can not be questioned collaterally. They must be corrected by some direct proceeding for that purpose, either before the same court, to set them aside, or in a court of review. Kempe's Lessee *v.* Kennedy, 5 Cranch (U. S.) 173; Harvey *v.* Tyler, 2 Wall. (U. S.) 328; Voorhees *v.* Bank of United States, 10 Peters (U. S.) 449; Thompson *v.* Tolmie, 2 Peters (U. S.) 157; Kruse *v.* Wilson, 79 Ill. 233; Gibbons *v.* Bressler, 61 Ill. 110; Gilkeson *v.* Knight, 71 Mo. 403; McGavock *v.* Bell, 3 Cold. (Tenn.) 512.

Not for insufficiency of bond.—On the principle that the bond required of an attachment plaintiff is only for the security of the defendant—*ante*, §§ 153 and 185—a subsequent attaching creditor can not take advantage of any defect in the bond given by a prior attaching creditor. Van Arsdale *v.* Krum, 9 Mo. 397; Camberford *v.* Hall, 3 McCord (S. C.) 345.

The second attacher must have acquired a valid lien upon the property covered by the prior attachment, and must have established this fact by legal evidence, before he has any right to be heard in contravention of the rights of the prior attaching creditor, for until such fact is established he is a mere stranger to the proceeding.[1]

In some states a judgment lien is necessary before any proceedings can be instituted to test the validity of the rights of a prior attaching creditor, or to interfere to prevent the application of the debtor's property to the satisfaction of a prior fraudulent attachment.[2]

A court of equity will interfere to prevent injury from fraud when no adequate remedy is provided or can be had in a court of law. A court of equity will not interfere where an adequate supplemental proceeding at law is provided by statute.[3] Therefore if a second attaching creditor has a right to intervene in a suit at law to question the validity of a prior attachment, a court of equity will not assume jurisdiction.[4] But in a state where such junior attaching creditor can not appear and defend in the prior attachment suit, he may, by a bill in chancery, contest the lien claimed by the prior attaching creditor.[5] In New Hampshire and Oregon the second attachment gives the creditor a sufficient lien to support a bill in chancery to remove

1. Tim *v.* Smith, 93 N. Y. 87, 65 How. (N. Y.) Pr. 199, 353, 13 Abb. (N. Y.) n. c. 31; Knudson *v.* Matuska, etc., F. Co., 1 How. (N. Y.) Pr. n. s. 152; Williams *v.* Waddell, 5 N.Y. Civ. Proc. 191; Thornburgh *v.* Hand, 7 Cal. 554; McMinn *v.* Whelan, 27 Cal. 300.

What prior attaching creditor must show.—To sustain his attachment the prior attaching creditor must show that he had a valid right to appropriate the property, and that he has conformed substantially with all the requirements of the statute. Stone *v.* Miller, 62 Barb. (N. Y.) 430. He must show the existence of his debt, for without it he has no right to appropriate the property, and, in Pennsylvania at least, he must show it by other evidence than a judgment in his favor, for the record of a judgment is not *prima facie* proof in such cases. Moyer *v.* Lobengier, 4 Watts. (Pa.) 390.

2. Bentley *v.* Goodwin, 15 Abb. (N. Y.) Pr. 82; Wintringham *v.* Wintringham, 20 Johns. (N. Y.) 296; Martin *v.* Michael, 23 Mo. 50; Alley *v.* Myers, 2 Tenn. Chy. 206.

3. Suydam *v.* Huggeford, 23 Pick. (Mass.) 465.

4. Freeman *v.* Carpenter, 147 Mass. 23, 16 N. E. Rep. 714.

5. Hale *v.* Chandler, 3 Mich. 531.

the fraudulent lien or conveyance.[1] And in California, a court of equity will grant an injunction to stay fraudulent proceedings on petition of attaching creditors who are compelled to await the process of their action at law.[2] And will, on petition of a judgment creditor in attachment, enjoin a wrongful sale of the same property attached on another writ.[3]

Part II. Priorities Between Attachments and Other Processes and Deeds.

§ 412. **Existing title or lien has priority over attachment.** —Whenever a debtor has placed security into the hands of his creditor for his debt, another creditor can not, by attachment or garnishment, take such security from the secured creditor. Where a lien or incumbrance exists upon property such property can only be attached subject to the existing lien and the attachment will only create a lien upon the surplus or residue

1. Stone *v.* Anderson, 6 Foster (26 N. H.) 506; Dawson *v.* Sims, 14 Ore. 561.

2. Heyneman *v.* Dannenberg, 6 Cal. 376.

3. Porter *v.* Pico, 55 Cal. 165.

In Mississippi, junior attaching creditors can maintain a bill in chancery to vacate a senior attachment, but not on the ground that it was sued out by an equitable owner of the note on which it was based and prosecuted to judgment in his name. Jones *v.* Moody, 59 Miss. 327. A proof that the plaintiff owns, by assignment, the property attached, will establish the court's want of jurisdiction to try an issue as to the priority between his attachment and another. Bush *v.* Nance, 61 Miss. 237. In Texas, an injunction may be sued out to restrain the wrongful preference obtanied by another attachment—Blankenship *v.* Wartelsky, (Tex.) 6 S. W. Rep. 140—or confession of judgment. Blum *v.* Schram, 58 Tex. 524.

It is no ground in a court of chancery in Vermont for postponing a prior attachment that the second attaching creditor was induced to delay his attachment by the other creditors telling him that he had attached, when in fact he had not, whereby the former gained time and opportunity to put his attachment first on the property. Bardwell *v.* Perry, 19 Vt. 292.

But in New Hampshire, on intervention, it was held to be a direct fraud and not a fair exercise of superior diligence, that an attaching creditor told another creditor that he proposed making arrangements whereby the mortgage could be removed and another given to himself, advising the latter to make such an arrangement, as the security for his debt would be ample, and thereafter himself attached the premises in question after the proposed arrangement had been completed and the first mortgage discharged, but before the new one had been executed. Buswell *v.* Davis, 10 N. H. 413.

after the secured creditor's lien is satisfied. The pledged property in the hands of the pledgee can not be taken from his possession,[1] and all that he can be required to do is to hold it subject to the attachment in question, and to deliver up such part as may remain after his own mortgaged lien, attachment lien, or other lien is satisfied.[2]

To make a lien effeceive, however, against an attaching creditor such creditor, or the officer making the attachment, must have notice of the prior lien; but the attaching creditor is chargeable with notice in the same manner and to the same effect as a subsequent purchaser, which rules are too generally known to need repetition in a work of this character.[3] Even a verbal lien on real estate has been supported against a subsequent attachment.[4] But a contract for a future lien, which

1. Except after paying to him or tendering to him the amount of his demand. *Ante*, § 212.

2. Nolen *v.* Crook, 5 Humph. (Tenn.) 312; Cole *v.* Wooster, 2 Conn. 203; Tennant *v.* Watson, 58 Ark. 252, 24 S. W. Rep. 495; State *v.* Burton, 11 Wis. 50.

Where one holds a warehouse receipt upon which only a part of the amount due has been paid and the remainder promised to be paid by a banker when collected, the balance when collected by the banker can not be garnisheed by a third person. State *v.* Burton, 11 Wis. 50.

3. Bank of North America *v.* M'Call, 3 Binn. (Pa.) 338; Whitaker *v.* Sumner, 20 Pick. (Mass.) 399; Depeyster *v.* Gould, 3 N. J. Eq. (2 Green) 474; Perrin *v.* Reed, 35 Vt. 2; McLaughlin *v.* Shepherd, 32 Me. 143.

A creditor who has attached the property of a debtor after he has had notice from a third person that an interest was claimed in the fund, is bound to refund to that third person his proportion of the proceeds received from the attachment, notwithstanding the judgment of the court by its terms gave all the proceeds to the attachment creditor. Bank of North America *v.* M'Call, 3 Binn. (Pa.) 338.

Notice of the assignment of a debt given by the assignee to one of two trustees (appointed in insolvent proceedings) is sufficient to protect the property in the hands of the trustees against subsequent attachments by other creditors of the insolvent debtor. Foster *v.* Mix, 20 Conn. 395. Where a debt is assigned and the debtor has notice thereof before being served with garnishee process in favor of his creditor's creditor, or if he has notice within a reasonable time after the assignment it can not thereafter be attached by garnishment in his hands at suit of the assignor's creditors. Fanton *v.* Fairfield County Bank, 23 Conn. 485.

4. Houston *v.* McCluney, 8 W. Va. 135.

This was where the return stated that both *personal* and real property had been attached.

is only perfected after another creditor without notice has attached, is not prior to such attachment.[1]

§ 413. **When prior judgment is a lien.**—A judgment entered against a defendant, when free from fraud or other defect affecting the jurisdiction of the court to enter it, and when the same becomes a lien without the issuance or levy of an execution, is superior to all subsequent liens created by attachment.[2] And though it be a judgment by confession the *bona fides* of such judgment can not be impeached by one who merely holds a lien thereon by a subsequent attachment. That can only be done by a judgment creditor.[3]

An attachment is, however, superior to a *subsequent judgment*, although the summons commencing the suit on which the same was rendered may have been previously executed.[4]

§ 414. **When prior execution is not a lien.**—A levy on execution upon personal property, of course, creates a lien superior to that of a subsequent attachment of the same property; but the fact that the execution is issued prior to the attachment does not (when a levy is necessary to make an execution issued on a judgment a lien) cause such execution to take priority over an attachment thereafter issued, if a levy be made under the attachment writ before a levy is attempted to be made on execution.[5] And no actual seizure is necessary to give the at-

1. Bailey *v.* Warner, 28 Vt. 87.

2. Reeves *v.* Johnson, 12 N. J. L. (7 Hals.) 29.

3. Hall *v.* Stryker, 29 Barb. (N. Y.) 105; Bentley *v.* Goodwin, 38 Barb. (N. Y.) 633; *ante*, § 411.

But where a sheriff is in possession of a debtor's goods by virtue of an execution issued on a judgment by confession and a subsequent writ of attachment is served by him upon the same property then a subsequent attaching creditor has, upon a proper allegation of fraud, a sufficient lien to procure the issuance of an injunction. Blum *v.* Schram, 58 Tex. 524.

4. Tappan *v.* Harrison, 2 Humph. (Tenn.) 172.

5. Field *v.* Milburn, 9 Mo. 492; Wallace *v.* Hanley, 4 J. J. Marsh. (Ky.) 622; Bourne *v.* Hocker, 11 B. Mon. (Ky.) 23; Bradley's Appeal, 89 Pa. St. 514; Blodgett *v.* Adams, 24 Vt. 23; Hanchett *v.* Ives, 133 Ill. 332, 24 N. E. Rep. 396.

But otherwise where the execution binds from the time of its delivery to the officer. Hanchett *v.* Ives, 133 Ill. 332, 24 N. E. Rep. 396.

The officer making the attachment has also a sufficient possession to support trespass or trover against another

tachment writ priority over the execution, where a valid attachment may be made without seizure, in some of the methods prescribed by law.[1]

§415. **When chancery process takes priority.**—A chancery process, sued out by a creditor against a debtor, will take priority over a writ of attachment against the same debtor, where no levy is made upon the attachment writ until after service is had on the chancery process, although judgment be had in the attachment suit before a decree is entered in the chancery proceeding.[2] And where a statute provides that no interest can be acquired by third persons during the pendency of an action affecting real estate, against the plaintiff's title in the subject matter of such action, a bill in chancery, filed to subject certain land to the payment of a judgment to be obtained in a pending action, will take priority over an attachment levied after the filing of the bill.[3] Furthermore, a bill in chancery will take priority over a previous insufficient levy of a writ of attachment, although the decree in chancery be not entered till after judgment is rendered for the plaintiff in the attachment proceedings.[4] But in one case it has been held that an execution issued on a judgment obtained on an attachment issued *about the time* a bill was filed by another creditor, will take the property in question and give a good title thereto on sale, notwithstanding the pendency of chancery proceedings to subject the same property to the other creditor's demand.[5]

An attachment can not, however, be affected by a subsequent chancery proceeding, unless the attachment plaintiff is made

officer, thereafter taking the same from his possession upon a levy made under another writ. Blodgett *v.* Adams, 24 Vt. 23. See further, *ante*, § 392.

1. Stockley *v.* Wadman, 1 Houston (Del.) 350; *ante*, §§ 209, 223, 229, *et seq.*

2. Jefferson County Sav. Bank *v.* McDermott, 99 Ala. 79, 10 So. Rep. 154; Erskine *v.* Staley, 12 Leigh. (Va.) 406; Cotton *v.* Dacey, (Cir. Ct.) 61 Fed. Rep. 481; Seeley *v.* Missouri, K. & T. Ry. Co., 39 Fed Rep. 252; Bank of Middlebury *v.* Edgerton, 30 Vt. 182.

3. Keith *v.* Losier, 88 Iowa 649, 55 N. W. Rep. 952.

4. People's Bank *v.* West, 67 Miss. 729, 7 So. Rep. 513.

5. Oldham *v.* Scrivener, 3 B. Mon. (Ky.) 579.

a party thereto. The rights of one who has attached an equity of redemption in mortgaged property will not be affected by a decree of foreclosure on a bill brought subsequent to the attachment unless the attachment plaintiff is made a party to the suit.[1]

§ 416. **When distress warrant takes priority.**—The policy of the law, in all states giving a landlord a lien upon growing crops for the rent of his land, is, that the landlord's lien is in existence while the crop is growing, although no steps be then taken to enforce it, and that such existing lien is superior to all subsequent liens after acquired. Therefore where such landlord's lien exists upon a growing crop no attachment can be made thereon that will deprive the landlord of his share in the crop when the crop is matured, even though the attachment lien be perfected by judgment before that time.[2] A landlord's special lien upon other goods of the defendant is governed by the same rule. And although the tenant's goods may have been seized under an attachment and sold by order of the court, a landlord having a lien thereon for rent will be allowed to come in and claim so much of the proceeds as he could have legally demanded for rent in arrears had the goods not been taken on execution issuing on the judgment obtained in the attachment.[3] Even though goods distrained for rent by a landlord were by him permitted to be taken out of the county, where they were attached, the landlord may have replevin and taken the goods from the attaching creditor.[4]

§ 417. **When unrecorded deed gives prior lien.**—The policy of the law is to place attaching creditors on the same basis as purchasers for value. The lien of the attaching creditor is deemed to create an equitable title equal to that of a purchaser,

1. Lyon *v.* Sandford, 5 Conn. 545.

2. Atkins *v.* Womeldorf, 53 Iowa 150; Hopkins *v.* Pedrick, 75 Ga. 706.

A distress warrant, issued in December, on a landlord's lien, on the crop, will take priority over an attachment against the tenant levied in September and put in judgment in October. Hopkins *v.* Pedrick, 75 Ga. 706.

3. Thomson *v.* Baltimore, etc., Steam Co., 33 Md. 312.

4. Calvert *v.* Stewart, 4 Cranch. C. Ct. 728.

and the principle "that the first in diligence or time is the first in right" applies equally well between purchasers and attaching creditors as between creditors; therefore the first to procure title or lien has priority. But this primary rule is affected by that requiring notice to third parties to be given by one procuring title to, or acquiring a lien upon, property which is not manifestly within his possession. Thus where one is in actual possession of real estate all the world is charged with notice of his claim; but where one is not in actual possession of land it is an almost universal requirement of statute that he give constructive notice of his claim by means of entries upon public records provided for that purpose. Therefore, one who claims title to real estate must either have actual and notorious possession of the same, or his title must be a matter of record as prescribed by law. If it is not, a subsequent attachment against a former owner or occupant of the land will become a valid and prior lien thereon in the same manner as though such attaching creditor were a *bona fide* purchaser for value and without notice. In other words, an attachment will create a lien which will be superior to an unrecorded deed, provided the attaching creditor have no actual notice of the conveyance of title. But actual notice of an unrecorded deed is equivalent to the constructive notice of a record, and will postpone the lien of the attaching creditor to that of the grantee named in the deed.[1]

1. Bissell *v.* Nooney, 33 Conn. 411; Cox *v.* Milner, 23 Ill. 422,(476); Martin *v.* Dryden, 6 Ill. (1 Gilm.) 187; Clayburg *v.* Ford, 3 Ill. App. 542; First Nat. Bank *v.* Jasper Co. Bank, 71 Iowa 486, 32 N. W. Rep. 400; McNeill *v.* Glass, 1 Martin n. s. (La.) 261; Hayford *v.* Rust, 81 Me. 97, 16 Atl. Rep. 372; Emerson *v.* Littlefield, 12 Me. 148; Woodward *v.* Sartwell, 129 Mass. 210; Priest *v.* Rice, 1 Pick. (Mass.) 164; Carter *v.* Champion, 8 Conn. 549; Cushing *v.* Hurd, 4 Pick. (Mass.) 253. See Briggs *v.* French, 2 Sumn. 251; Spear *v.* Hubbard, 4 Pick.(Mass.) 143; Sigourney *v.* Larned, 10 Pick. (Mass.) 72; Coffin *v.* Ray, 1 Metc. (Mass.) 212; Horton *v.* Hubbard, 83 Mich. 123, 47 N. W. Rep. 115; Lamberton *v.* Merchants' Nat. Bank, 24 Minn. 281; Lamont *v.* Cheshire, 65 N. Y. 30; Bateman *v.* Backus, 4 Dak. 433, 34 N.W. Rep. 66; Schutt *v.* Large, 6 Barb. (N. Y.) 373; Galley *v.* Ward, 60 N. H. 331; Riddle *v.* Miller, 18 Ore. 460, 23 Pac. Rep. 807; Vance *v.* Cooper, 2 Coldw. (Tenn.) 497; Dickerman *v.* Ray, 55 Vt. 65; Bigelow *v.* Topliff, 25 Vt. 273; Temple *v.* Hooker, 6 Vt. 240; Smith *v.* Smith, 19 Gratt. (Va.)

The deed of which he has notice must be an existing deed, for mere notice that a deed is being made will not postpone the lien of an attachment made before such deed is recorded.[1]

When the attaching creditor has no notice of the prior unrecorded deed at the time he levies his attachment, any notice subsequently acquired, although before execution and sale on his judgment on attachment, will not defeat the priority of his claim upon the land.[2] Where, however, the return of the writ is necessary to perfect the inchoate attachment lien, notice of the execution of a deed after the issuance of the writ and before

545; Hardaway *v.* Semmes, 38 Ala. 657; Richeson *v.* Richeson, 2 Gratt. (Va.) 497; Merchants' B. & L. Assn. *v.* Barber, (N. J. Ch.) 30 Atl. Rep. 865. Compare Kent *v.* Roberts, 2 Story (U. S.) 591.

One who, without actual or constructive notice of a prior conveyance or incumbrance, makes an attachment before the recording of such conveyance or incumbrance, whether the debt be prior or subsequent to it gets a lien prior to them, no matter whether the debtor have at the time of conveying or encumbering other property sufficient to pay the debt or not. Martin *v.* Dryden, 6 Ill. (1 Gilm.) 187.

The attachment need not describe the attached property specifically to cause it to take priority over a deed executed *after* the issuance of the writ, but before its levy. Vance *v.* Cooper, 2 Cold. (Tenn.) 497.

An attaching creditor acquires no rights against an outstanding equity of which he has knowledge at the time of the attachment. Riddle *v.* Miller, 18 Ore. 460, 23 Pac. Rep. 807. Where a land contract has been entered into, a subsequent valid attachment will not defeat the vendee's right to insist upon a specific performance of such land contract. Horton *v.* Hubbard, 83 Mich. 123, 47 N. W. Rep. 115.

Priority over unacknowledged deed placed for record.—That an instrument may be deemed to be recorded at the time it is filed for record, it must be one that comes within the contemplation of the recording law. Consequently, a deed having no certificate of acknowledgment, although placed into the hands of the recorder *at the same time* the attachment was made, can not take priority over the attachment. Sigourney *v.* Larned, 10 Pick. (Mass.) 72.

But a deed executed and delivered before the attachment levy, and thereafter duly acknowledged and recorded before a sale of the property by the sheriff under the attachment proceedings, will take priority over the sheriff's deed and vest a valid title in the original purchaser. Chandler *v.* Bailey, 89 Mo. 641, 1 S. W. Rep. 745.

1. Cushing *v.* Hurd, 4 Pick. (Mass.) 253. Compare Briggs *v.* French, 2 Sumn. (U. S. Cir. Ct.) 251.

2. Martin *v.* Dryden, 6 Ill. (1 Gilm.) 187; Cross *v.* Fombey, 54 Ark. 179, 15 S. W. Rep. 461; Beamer *v.* Freeman, 84 Cal. 554, 24 Pac. Rep. 169.

its return will defeat the priority of the attachment creditor's lien.[1]

The attachment lien is limited to the debtor's interest in the land attached, and if a third person have an interest in such land, although he hold the same by unrecorded deeds and equities, he may give notice to the purchaser at the sale on execution and thereby preserve rights and equities in the land.[2]

§ 418. **When prior unrecorded mortgage gives prior lien.**—A mortgage is a "deed" within the technical meaning of the word, and also being only a deed of conveyance with a defeasance clause, the rules laid down in the above section apply equally as well to unrecorded mortgages on real estate as to title deeds absolute.[3]

The recording of chattel mortgages also being required by law as notice to third persons of the mortgagee's claim when he is not in actual possession of the pledged property,[4] a subsequent attaching creditor will have priority over a creditor secured by chattel mortgage when the same has not been placed of record,[5] and when such attaching creditor has no actual notice of the existence of the unrecorded mortgage.[6]

1. Richeson *v.* Richeson, 2 Gratt. (Va.) 497.

2. Hope *v.* Blair, 105 Mo. 85, 16 S. W. Rep. 595.

3. Hardaway *v.* Semmes, 38 Ala. 657; Temple *v.* Hooker, 6 Vt. 240; First Nat. Bank *v.* Jasper Co. Bank, 71 Iowa 486, 32 N. W. Rep. 400; *ante*, § 417.

4. When a pledgee is in possession of chattels intended as security for a debt he must retain possession if he would make good his right to it as against *bona fide* purchasers or creditors of the party who pledged the property to him. Shaw *v.* Wilshire, 65 Me. 485.

When property belonging to an absent debtor, in possession of one creditor whose demands were made by keeping it, is attached by another creditor, the one in possession has a lien paramount to that of the attaching creditor. Williamson *v.* Gayle, 7 Gratt. (Va.) 152.

5. Fearey *v.* Cummings, 41 Mich. 376; Hardaway *v.* Semmes, 38 Ala. 657.

Possession is notice. E. C. Meacham Arms Co. *v.* Strong, 3 Wash. T. 61, 13 Pac. Rep. 245; Petring *v.* Chrisler (Heer Dry Goods Co. Interpleader), 90 Mo. 649, 3 S. W. Rep. 405. And the mortgagee in possession will take priority over a subsequent attachment, although the mortgage itself be invalid. Nash *v.* Norment, 5 Mo. App. 545.

6. Stewart *v.* Smith, 60 Iowa 275.

Actual notice in these cases also postpones the lien acquired by attachment to the lien of the mortgagee.[1] Likewise the priority, incident to lack of notice of the existence of the chattel mortgage, at the time the attachment was levied, will not be affected by a subsequent notice or record of such mortgage prior to execution and sale on the judgment obtained on attachment.[2]

The attachment must be valid else it can not take priority over the rights of a mortgagee of the same property, even though the attaching creditor has no notice, actual or constructive, of the mortgage when the levy is made.[3]

§ 419. **When transfer of corporate stock gives priority.**—The purchaser of corporate stock will take priority over a subsequent attaching creditor, although no transfer of such stock be made on the books of the corporation, unless such transfer is required by statute or by the charter or by-laws of the corporation, and where the attachment plaintiff have actual notice of the same.[4] The rule in this regard is similar to that relating to deeds and mortgages.[5]

1. Crane *v.* Chandler, 5 Colo. 21; Bacon *v.* Thompson, 60 Iowa 284; First Nat. Bank *v.* Hayzlett, 40 Iowa 659.

2. Cross *v.* Fombey, 54 Ark. 179, 15 S. W. Rep. 461; Beamer *v.* Freeman, 84 Cal. 554, 24 Pac. Rep. 169.

3. Haller *v.* Parrott, 82 Iowa 42, 47 N. W. Rep. 996.

Practice.—Where there is a prior mortgage on chattels, the articles can not be attached *and taken from the possession* of the mortgagee without offering to pay him the amount of his claim. Fox *v.* Cronan, 47 N. J. L. 493, s. c. 54 Am. Rep. 190; *ante*, § 212.

But the officer may, in New Jersey at least, attach the interest of the mortgagor, advertise it for sale and on the day of sale may require the mortgagee to permit bidders to view the property, and by virtue of his writ may enforce the mortgagee to obey his duty in that regard. Fox *v.* Cronan, 47 N. J. L. 493, s. c. 54 Am. Rep. 190.

When the mortgagee claims a lien upon goods confused with others the officer must permit him to select them if he can do so himself or with the aid of the mortgagor. Morrill *v.* Keyes, 14 Allen (Mass.) 222; *ante*, § 387, "When Goods Intermingled."

And whenever in such case the mortgagee omits to name one or more of the chattels the attachment then will be valid as to it or them. Woodward *v.* Ham, 140 Mass. 154.

4. Boston Music Hall Assn. *v.* Cory, 129 Mass. 435; Beckwith *v.* Burrough, 13 R. I. 294; Cheever *v.* Meyer, 52 Vt. 66; Scott *v.* Pequonnock Nat. Bank, 15 Fed. Rep. 494.

5. *Ante*, §§ 417 and 418.

Under a statute providing that a state should subscribe for half of the stock of an incorporated company

§ 420. When incomplete sale of chattels gives priority.—Since the title to chattels does not pass upon a contract of sale until the chattels are delivered either by an actual delivery of possession or by a symbolic delivery, as the delivery of a bill of lading, etc., an attachment at suit of the vendor's creditors which is levied prior to such a delivery will create a lien which will take priority over the rights of the vendee. This rule is likewise dependent upon the lack of actual notice on the part of the attaching creditor.[1] But it is said that where the buyer uses the highest diligence to obtain possession, his rights are thereby made paramount to those of an attaching creditor of the vendor on a writ issuing after the bill of sale and levied before the buyer could obtain possession.[2]

When a vendee buys personal property on a conditional sale, that is, upon condition that the title will not pass to him until a certain time or until he has paid a certain price in installments or otherwise, or on any other condition precedent, a sale and *delivery* of the property to the vendee does not vest the legal title in him until he performs the named condition, or the seller waives it; and the rights retained therein by the vendor will take priority over any that may be acquired by attachment at suit of a creditor of the vendee.[3] A vendee's creditor can not attach such property, although he be willing to continue to fulfill the terms of the contract. He has no right to attach until the title is complete in the vendee.[4] Where, however, the title is vested in the vendee and the seller has only a vendor's lien thereon, the property may be attached at suit of the vendee's creditor by payment or tender of payment within a proper time of the amount claimed.[5]

therein, it was held that the corporate stock of the corporation was not attachable at suit of its creditors until a lien of the state was extinguished by payment for the stock. State *v.* Lagrange, etc., Railroad Co., 4 Humph. (Tenn.) 488.

1. Bancker *v.* Brady, 26 La. Ann. 749; Seymour *v.* O'Keefe, 44 Conn. 128.

2. Keller *v.* Paine, 34 Hun (N. Y.) 167; Hatch *v.* Bayley, 12 Cush. (Mass.) 27.

3. Buckmaster *v.* Smith, 22 Vt. 203; Hale *v.* Huntley, 21 Vt. 147; McFarland *v.* Farmer, 42 N. H. 386; compare Chase *v.* Ingalls, 122 Mass. 381.

4. Hale *v.* Huntley, 21 Vt. 147.

5. Fales *v.* Roberts, 38 Vt. 503. *Ante*, § 37.

But where he has no perfected lien, although the price be unpaid, an at-

The right to rescind for fraud possessed by the vendor may or may not affect the attachment of a fraudulent vendee's creditor. Such a creditor whose debt existed at the time of the fraudulent purchase can not, by mere attachment of the goods, prevent the vendor from rescinding the contract, for he obtains no better right in the goods than that of his debtor; and a subsequent creditor who may be supposed to have given credit upon the apparent ownership of the vendee may hold the goods if he attached them before the contract is rescinded by the vendor.[1]

Goods in transitu, although considered to be in the hands of the agent of the vendee, are yet subject to the vendor's right of *stoppage in transitu*, and such right is therefore superior to any that may be acquired by attachment at suit of a vendee's creditor.[2]

Goods that are sold and thereafter delivered to a carrier consigned to the vendee can not be attached *in transitu* by the vendee's creditor without paying or making a tender of payment of the carrier's charges, for he has a paramount lien therefor.[3]

§ 421. **When subsequent purchaser has prior title.**—When one purchases property without actual or constructive notice of a prior attachment, and for a good consideration, he is a *bona fide* purchaser and his title will be good as against the world.[4] But if he have any notice whatever of the prior attachment he will take in subordination to it. In Florida, the levy of the attachment is itself a constructive notice from its date to all

tachment at suit of a creditor of the vendee will take priority. Empire State Type Founding Co. *v.* Grant, 44 Hun (N. Y.) 434.

When attachment no bar to delivery.—Where chattels are attached or attempted to be attached and are not yet in *custodi legis* by being taken into the possession of the officer, such attachment is no bar to a delivery in pursuance of a previous contract, even though the person receiving them has notice of the attempted levy. Crisman *v.* Dorsey, 12 Col. 567. *Ante*, § 46.

1. Bradley *v.* Obear, 10 N. H. 477.

2. Hause *v.* Judson, 4 Dana (Ky.) 7.

3. Wolfe *v.* Crawford, 54 Miss. 514; *ante*, § 40.

4. Young *v.* Kellar, 94 Mo. 581; Canda *v.* Powers, 38 N. J. Eq. 412; Rothermel *v.* Marr, 98 Pa. St. 285.

subsequent purchasers.[1] And this is true in all states where chattels are attached and taken into the actual possession of the officer.[2] Any actual notice possessed by the purchaser will subordinate him to the lien of the prior attachment.[3] But such prior attachment must be a valid one, or the purchaser's title will not be affected thereby.[4]

§ 422. When trustee has prior title.—A trustee who has obtained title in good faith, and not in fraud of creditors, takes priority over subsequent attachments. Where preferences are permitted, a creditor may take a conveyance of land in trust for himself and another creditor, in consideration of his indebtedness, and his deed will take priority over a subsequent attachment at suit of another creditor.[5]

The trustee himself has legal title susceptible of attachment at suit of his creditors, although the land was conveyed to him to be by him conveyed to another, if the attachment be levied upon it while the title is in him.[6]

1. Though the property at the time of the levy be in the possession of a third person not a party to the suit, under a fraudulent conveyance by the attachment debtor. McClellan *v.* Solomon, 23 Fla. 437, 2 So. Rep. 825.

And an ancillary attachment upon land gives the same notice to subsequent purchasers as though it were levied at the inception of the suit. Budd *v.* Long, 13 Fla. 288.

2. *Ante*, §§ 200 and 244.

3. Baldwin *v.* Leftwich, 12 Ala. 838.

Where the statute requires the keeping of "a book in which an index of all liens in district or circuit courts shall be kept" an *unindexed* entry in the "incumbrance book," showing an attachment on land described, is notice to subsequent purchasers. Blodgett *v.* Huiscamp, 64 Iowa 548.

But the exi tence of a record of an attachment can not be proved by merely balancing probabilities. It must be shown clearly and satisfactory or the *bona fide* purchaser will be without notice. Worcester Nat. Bank *v.* Cheeney, 87 Ill. 602.

4. Saco *v.* Hopkinton, 29 Me. 268.

Purchaser's defense to prior attachment.—A purchaser after attachment, and before levy on execution and sale, may show any matters affecting the jurisdiction of the court in the attachment in like manner that the same may be done by other attaching creditors. *Ante*, § 404, *et seq.* He may show as against one claiming title to real estate by virtue of an attachment and a subsequent levy of execution, that an amendment was made to the declaration which added a new cause of action; and he may show this by parol evidence. Freeman *v.* Creech, 112 Mass. 180; *ante*, § 406.

5. Bean *v.* Patterson, 4 McCrary Cir. Ct. 179.

6. Nelson *v.* Henry, 2 Mackey (D. C.) 259.

§ 423. **When assignee has prior title.**—An assignee of a debtor, who takes title in good faith, will hold priority over a subsequent attachment by another creditor in a state where preferences are allowed, although the assignment is made in another state.[1] But in order that the assignment may take priority over the attachment the assignee must have actual and notorious possession, or the attaching creditor must have actual notice or constructive notice by a record of the assignment.[2]

An attachment, however, will take priority over all subsequent assignments.[3] A creditor attaching property in the hands

1. Robinson *v.* Rapelye, 2 Stew. (Ala.) 86; Brown *v.* Millington, 25 Vt. 242; Tootle *v.* Cahn & Co., (Miner), 52 Kan. 73, 34 Pac. Rep. 401; Franklin FireIns. Co. *v.* West, 8 Watts & S. (Pa.) 350; Geddes *v.* Geddes, 7 Pa. Co. Ct. Rep. 660; Wells *v.* Biscoe, 3 Gill. (Md.) 406.

Assignee of negotiable instrument.—A draft, drawn by the creditor, upon a debtor who is afterwards made a garnishee, is an assignment of the funds in the hands of the debtor, and will have priority over the garnishee plaintiff's lien. Miller *v.* Hubbard, 4 Cranch C. Ct. 451.

On the same principle an attachment sued out against the payee of a bill of exchange, and levied upon the funds, will not bind them as against the indorsee of the bill, when the latter sues in the name of the payee to recover on such bill. Corser *v.* Craig, 1 Wash. (C. C.) 424.

An attachment levied on a debtor's land after an assignment of all his estate, for the benefit of his creditors, creates no lien as against creditors. Nethercutt *v.* Herron, (Ky.), 8 S. W. Rep. 13.

A creditor who is not willing to accept his proportion, when an assignment is made for the benefit of creditors under an insolvency act, but levies an attachment upon the property in the hands of the assignee, will only get a lien upon the surplus of the property if there be any. Bigelow *v.* Pritchard, 21 Pick. (Mass.) 169. And such insolvency proceeding may be invalid as against a foreign attachment plaintiff. Hurd *v.* Silsby, 10 N. H. 108.

But one who accepts a share tendered him on distribution in insolvency can not go behind his acceptance. Blake *v.* Baldwin, 54 Conn. 5.

2. Clark *v.* Connecticut Peat Co., 35 Conn. 303; Gibson *v.* Stevens, 3 McLean 551; Yates *v.* Dodge, 23 Ill. App. 338, 123 Ill. 50, 13 N. E. Rep. 847; Wells *v.* Lamb, 18 Neb. 352.

3. Conway *v.* Butcher, 8 Phila. 272; *In re* Nelson, 9 Ben. 238; Wilson *v.* Forsyth, 24 Barb. (N. Y.) 105.

The debtor can not avoid an attachment lien by a subsequent assignment for the benefit of creditors. Conway *v.* Butcher, 8 Phila. (Pa.) 272. Or by subsequent insolvency proceedings. *In re* Nelson, 9 Ben. 238; Wilson *v.* Forsyth, 24 Barb. (N. Y.) 105. (Except in a state where preferences are not permitted and the assignment is made within a certain time after the attachment.)

Where there has been an attachment of land, and the same has been partly satisfied by a sale, an assignment will not prevent the officer from thereafter selling so much of the real estate at-

of an assignee, takes preference over another creditor who becomes a party to the assignment after the attachment;[1] and takes priority over one taking title from an assignee between the time the sheriff's demand upon such assignee is refused and the time when the court orders a delivery of the property by the assignee to the attaching officer.[2] When, however, personal property is attached the officer must have the property in his keeping, or in some way make it manifest to third parties, or an assignee of such chattel will take good title thereto on the principle that he is a purchaser without notice.[3]

A fraudulent assignment, when so determined by judicial investigation, will, of course, be ineffective as against a creditor attaching subsequent to the assignment. But if a *bona fide* purchaser, for value and without notice, take title under the fraudulent assignee and before the attachment, his rights will have priority over those of the subsequent attaching creditor of the assignor.[4]

§ 424. **When receiver has priority.**—Receivers appointed by a court in cases of insolvency are governed by the same general rules that control in other cases where attachments conflict

tached as is necessary to satisfy the balance. Wilson *v.* Forsyth, 24 Barb. (N. Y.) 105.

1. Ward *v.* Lamson, 6 Pick. (Mass.) 358.

Proof.—Where creditors attach prior to an assignment, and thereafter consent that the sheriff deliver possession to the assignee subject to their rights, they must thereafter, in order to maintain their claim to a prior lien, prove that their attachments were issued upon valid debts. Plume-Atwood Mfg. Co. *v.* Caldwell, 136 Ill. 163, 26 N. E. Rep. 599.

This, on the principle that as between the attaching officer or creditor and a stranger to the attachment there can be no justification without showing a valid attachment, which can not be done without showing that it issued on a just demand. *Ante*, § 399.

2. Anthony *v.* Wood, 29 Hun (N. Y.) 239.

Effect of waiver of exemption.—Where a debtor has made an assignment and reserved his legal exemption, and when an attachment is subsequently brought, then waives his exemptions, the property may be applied in satisfaction of the attachment lien because the assignee has no interest therein. Bank of Commerce *v.* Payne, 86 Ky. 446, 8 S. W. Rep. 856.

3. Wooster *v.* Bullock, 52 Vt. 48; Littleton *v.* Wyman, 69 Iowa 248.

4. Dixon *v.* Hill, 5 Mich. 404; Menken *v.* Gumbel, 57 Miss. 756; Peck *v.* Whiting, 21 Conn. 206.

with the private individual's claim. A receiver appointed subsequent to an attachment can not (in the absence of a special statute causing the insolvency proceedings to relate back to an anterior time) take priority over such an attaching creditor, where the proceedings for the appointment of the receiver were not instituted at the time of the attachment.[1] Furthermore, where the attaching creditor maintains his lien by the actual possession of the sheriff, a receiver appointed in a suit in which such attaching creditor is not a party has no right to the possession of the attached property, but the sheriff may keep it and dispose of it under his writ.[2] Property which has been seized under attachment is in custody of law as against third persons, therefore it can not be transferred to a receiver appointed in a proceeding at suit of other creditors.[3]

Where, however, a bill or petition is filed asking for a receiver and praying for an injunction to restrain the disposition of property, a creditor who makes an attachment subsequent thereto, though prior to the entry of a decree or order therein, acquires no valid lien and can not prevent the receiver from selling the property.[4] In matters of insolvency the courts take a broad view of the subject for the benefit of all the general creditors, and are not disposed to permit an attaching creditor by mere race of diligence, while the proceedings are in pro-

1. Page *v.* Supreme Lodge Knights and Ladies of Protection, (Mass.) 37 N. E. Rep. 369, s. c. Kittredg *v.* Osgood, 161 Mass. 384; Minchin *v.* Second Nat. Bank, 36 N. J. Eq. 436; Harrison *v.* Harwood, 31 Tex. 650.

Unless they be instituted on the same day in a state in which the law will not consider a fraction of a day in such cases. Cerf *v.* Oaks, 59 Cal. 132.

Attaching creditor can not share in receiver's distribution of funds unless they release their attachments or account for the property in their possession. Garham *v.* Mutual Aid Soc., 161 Mass. 357, 37 N. E. Rep. 447.

2. State *v.* Superior Court of Snohomish County, 7 Wash. 77, 34 Pac. Rep. 430; State *v.* Superior Court of Chehalis County, 8 Wash. 210, 35 Pac. Rep. 1087, s. c. 8 Wash. 659, 35 Pac. Rep. 1092; State *v.* Graham, 9 Wash. 528, 36 Pac. Rep. 1085.

3. Dollins *v.* Lindsey, 89 Ala. 217, 7 So. Rep. 234.

Exception in cases of insolvency.— The policy of the law being that the United States is a preferred creditor in the cases of insolvency, the preceding attachment will have no priority over a claim interposed in behalf of the United States Government. Willing *v.* Bleeker, 2 Serg. & R. (Pa.) 221.

4. Atlas Bank *v.* Nahant Bank, 23 Pick. (Mass.)480.

gress, to obtain priority over other creditors.' They are disposed to hold that the pendency of insolvency proceedings is such notice to third parties as will prevent a subsequent attaching creditor from acquiring a lien on the principles hereinbefore laid down.[2] After the appointment of a receiver an individual creditor can certainly get no lien under an attachment.[3]

§ 425. **When attachment is prior to deed of legatee or distributee.**—While *specific articles* of property still under the control of an executor or administrator of an estate not yet fully administered can not be attached at suit of a creditor of a residuary legatee or devisee, because such property is in custody of law,[4] yet a distributee's share when a charge on the estate or when ascertained ready for distribution may be attached in the hands of the executor or administrator at suit of the devisee's creditor.[5] And in such case the attaching creditor would have priority over a purchaser of such interest, although the distributee had theretofore agreed by parol with the administrator that the latter should sell his interest in the property.[6]

1. Fisher *v.* Vose, 3 Rob. (La.) 457.

2. *Ante*, §§ 404 and 408.

A bankrupt act once in force was intended to take priority over attachment liens acquired within four months next preceding the commencement of the bankruptcy proceedings. The effect of such a statute would be to dismiss all attachments begun within four months immediately preceding the action in bankruptcy. Hamilton *v.* Bryant, 114 Mass. 543; Taylor *v.* Whitefield, etc., Co., 58 N. H. 369; Moors *v.* Albro, 129 Mass. 9; Hirshiser *v.* Tinsley, 9 Mo. App. 339; Vreeland *v.* Bruen, 21 N. J. L. 214; but would have no effect upon pending attachments begun more than four months prior thereto. Gillett *v.* McCarthy, 23 Kan. 668.

3. Perego *v.* Bonesteel, 5 Biss. (U. S.) 66; Matter of Rowell, 21 Vt. 620.

4. Thornhill *v.* Christmas, 11 Rob. (La.) 201.

5. *Ante*, § 62.

6. Allison *v.* Graham, 67 Iowa 68.

CHAPTER XIX.

INTERVENTION.

Interplea.[1]

§ 426. Nature of the proceeding.
427. Who may intervene.
428. When claimant may intervene.
429. What issues may be determined by intervention.
430. Where the issue on intervention to be tried.
431. When issue on intervention to be tried.
§ 432. How to intervene.
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435. Parties defendant.
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438. Instructions to the jury.
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§ 426. **Nature of the proceeding.**—It is an elementary principle of law that a creditor who brings a suit against his debtor can not by such proceeding interfere with or permanently affect any of the rights of third persons not made parties to his suit. And that if such effect be apparently produced, the purchaser may, by some proper collateral proceeding in a court of competent jurisdiction, have redress for the wrong he has sustained by having the prior proceeding set aside or otherwise corrected; but for the purpose of avoiding unnecessary litigation, and the expense to such third person which he would thereby be compelled to pay out in the first instance, many

1. "Intervention" technically embraces the interposition of rights to property seized on attachment by a stranger to the attachment suit. An "interplea" is permitted to be filed in various proceedings in both law and equity and the term is sometimes used in attachment suits. In such cases it is synonymous to intervention, but it is more particularly used in garnishment proceedings where no rights of property can arise, but only the rights to claim the attached fund or a part thereof. "Garnishment," *post*, Vol. II.

courts permit a third person claiming a right of property to intervene in an attachment suit,[1] and have his rights determined by the court having jurisdiction of the property, and before a final determination of the attachment proceedings. This is allowed in Maryland and New Hampshire as a mere matter of good practice.[2] And in many other states where no such "practice" was theretofore recognized, an intervention is permitted by special statutes. When, however, intervention is permitted by statute, no person can intervene except as permitted by such statute. There are still other states which permit no intervention in the attachment suit, but leave the injured third person to resort to an independent proceeding.[3]

Intervention, when permitted or prescribed, is a privilege and not a necessity. There is no rule of law which compels an owner of attached property to intervene on notice of suit, and defend *pro interesse suo* on pain of forfeiting his rights of property or of action.[4] Therefore, one who intervenes is not estopped from a suit to replevy the property, nor from any other common law action. The remedy by intervention is additional and not conclusive.[5] Furthermore, the fact that one is prosecuting an independent suit does not prevent him from intervening in the attachment proceeding when he is otherwise permitted so to do.[6] But as a matter of law he can have but one satisfaction of the injury sustained.

1. As to the right to "interplead" in a garnishment proceeding, possessed by one claiming an interest in the fund, see *post*, Vol. II.

2. Howard *v.* Oppenheimer, 25 Md. 350; Blaisdell *v.* Ladd, 14 N. H. 129.

3. Pennsylvania Steel Co. *v.* New Jersey Southern R. R. Co., 4 Houst. (Del.) 572; Davis *v.* Warfield, 38 Ind. 461; Risher *v.* Gilpin, 29 Ind. 53; Gordon *v.* McCurdy, 26 Mo. 304; Crow *v.* Stevens, 44 Mo. App. 137; Boylen *v.* Young, 6 Allen (Mass.) 582; Hallam *v.* Jones, Gilmer, 21 Va. 142.

An intervention is sometimes only permitted in cases in which personal property is attached—Gordon *v.* McCurdy, 26 Mo. 304—while in others it is said to apply as well to real as to personal property. Juilliard *v.* May, 130 Ill. 87, 22 N. E. Rep. 477.

4. Megee *v.* Beirne, 39 Pa. St. 50.

5. Sheedy *v.* Second Nat. Bank, 62 Mo. 17; Lowry *v.* Kinsey, 26 Ill. App. 309; Carson *v.* White, 6 Gill, (Md.) 17; Sperry *v.* Ethridge, 70 Iowa 27.

6. Hall *v.* Richardson, 16 Md. 396.

But in Alabama one having a conflicting attachment suit pending can not intervene. *Post*, § 427.

The intervention raises an issue between the third person claiming a right in the property and the attachment plaintiff, which issue depends upon the jurisdiction of the court arising by virtue of the writ of attachment; therefore, where there is no valid attachment, as in a case where there is no valid service of a writ, there is no suit between the attachment plaintiff and the intervenor.[1] When an attachment suit is pending at law an intervention therein is a legal proceeding, and will not be changed to an equitable action simply because the pleading contains a "prayer" for relief.[2] Where, however, the statute provides for a bill in equity at the instance of an interpleader in foreign attachment, it is said that a court of equity will take entire jurisdiction of the matter pending at law and supersede it so that there will be no necessity of an injunction upon the suit at law.[3] But this is foreign to what is generally understood to be an intervention, which is not an independent action, but an interlocutory proceeding in the original attachment suit.

The intervention is, nevertheless, so much a distinct action that it must present matters sufficient to make an issue upon and to support a verdict and judgment.[4]

§ 427. **Who may intervene.**—Intervention is essentially the act of interposing a claim to try the right of *property*. In general, any person other than the defendant, having either a general or special property in the goods attached, may intervene in the attachment suit to have his rights adjudicated by

1. Gibson *v.* Wilson, 5 Ark. 422.

In Indiana, however, a third person who files a claim in the attachment suit acquires a lien which is not discharged by the dismissal of the original attachment proceedings on account of defective papers. Fee *v.* Moore, 74 Ind. 319. See further, Taylor *v.* Elliott, 51 Ind. 375; Lexington & Big Sandy R. R. Co. *v.* Ford Plate Glass Co., 84 Ind. 516.

It is said in California, however, that where an attachment is issued at the beginning of a void suit, a petition of intervention is proper at the instance of judgment creditors of the defendant who desire to maintain that the attachment is a fraud upon their rights. Davis *v.* Eppinger, 18 Cal. 378.

2. Markley *v.* Keeney, 87 Iowa 398, 54 N. W. Rep. 251.

3. Darrow *v.* Adams Express Co., 41 Conn. 525.

4. Neal *v.* Newland, 4 Ark. 459.

the court in which the same is pending.[1] But again it may be necessary for the intervenor to show a *prima facie* case of a *bona fide* title as owner,[2] pledgee or assignee. And in such case no other person can intervene, although the property may have been taken from his possession on the attachment levy.[3]

One, other than the defendant, who claims to be the owner or purchaser in good faith and for a valuable consideration, is a proper person to intervene.[4] And one who claims to have an undivided interest may also intervene when he is not a party to the writ.[5] But he can not do so when he is a party to the proceeding as a partner of the debtor or otherwise.[6] In Texas, one who has a seller's lien on the goods sold may intervene and enforce the same in an attachment suit, but he is not obliged so to do.[7] A consignor claiming the goods by consign-

1. Mitchell *v.* Hinman, 8 Wend. (N. Y.) 667; Dryer *v.* Abercrombie, 57 Ala. 497; Dean *v.* Stephenson, 61 Miss. 175; Dreyfus *v.* Mayer, 69 Miss. 282, 12 So. Rep. 267; New Orleans, etc., Co. *v.* Beard, 16 La. Ann. 345; Golsan *v.* Powell, 32 La. Ann. 521; Juilliard *v.* May, 130 Ill. 87, 22 N. E. Rep. 477. See Gates *v.* Penna. L. & L. Co., 9 Ohio Cir. Ct. Rep. 378, 2 Ohio Dec. 312.

2. Pierce *v.* Kingsmill, 25 Barb. (N. Y.) 631; Seisel *v.* Folmar, (Ala.) 15 So. Rep. 850.

3. Hardy *v.* Lemons, 36 La. Ann. 107; Abernathy *v.* Whitehead, 69 Mo. 28.

In Vermont, no one but the owner of the property or some person representing him can question the attachment and sale. Sanborn *v.* Kittredge, 20 Vt. 632.

When land is attached the title is directly involved. Therefore a wife, who claims to own land in fee-simple, may intervene when the land is attached for her husband's debt, and she be not a defendant in the attachment suit. Frank *v.* King (Humphrey), 121 Ill. 250, 12 N. E. Rep. 720.

4. Wallace *v.* Maroney, 6 Mackey (D. C.) 221; Heaverin *v.* Robinson, (Ky.) 21 S. W. Rep. 876; Ft. Worth (D. C.) 221; Heaverin *v.* Robinson, (Ky.) 21 S. W. Rep. 876; Ft. Worth Pub. Co. *v.* Hitson, 80 Tex. 216, 14 S. W. Rep. 843.

A bill of sale, made on the consideration that a return bill of sale should be made after certain acts were performed, does not pass title, and therefore the holder thereof can not intervene to try a right of property. Dallas Nat. Bank *v.* Davis, 78 Tex. 362, 14 S. W. Rep. 706.

As to heirs not being permitted to intervene because their deceased mother owned a community interest in land attached, see Hinzie *v.* Moody, 1 Tex. Civ. App. 26, 20 S. W. Rep. 769.

In Texas, one who intervenes and claims the property as an owner, may be made a party defendant by the attachment plaintiff, who may thereby enforce a demand which he has against such claimant. Ft. Worth Pub. Co. *v.* Hitson, 80 Tex. 216, 14 S. W. Rep. 843.

5. Hamburg *v.* Wood, 66 Tex. 168, 18 S. W. Rep. 623.

6. Meyberg *v.* Steagall, 51 Tex. 351.

7. Harris *v.* Tenney, 85 Tex. 254, 20 S. W. Rep. 82.

ment may intervene when the goods are attached as belonging to another.[1] A landlord claiming a special property by virtue of his lien may intervene in an attachment of the tenant's goods in a state where it is not necessary that one should claim "as owner" to be permitted to intervene; claiming a lien being a sufficient qualification.[2] In such states a surety on a claim bond may intervene and defend his rights.[3] Under such a statute, also, laborers claiming liens for wages upon the property attached may intervene in the attachment suit.[4] A person claiming under a deed of trust as a beneficiary or *cestui que trust* is permitted to intervene and assert his right of property.[5] A mortgagee of land or chattels will be admitted as an intervenor to show his right of property, when the subject of his mortgage is attached on the debt of the mortgagor.[6] A judg-

1. Wear *v.* Sanger, 91 Mo. 348, 2 S. W. Rep. 307; Blackly *v.* Matlock, 3 La. Ann. 366; Williams *v.* Piner, 10 La. Ann. 277; McGregor *v.* Barker, 12 La. Ann. 289.

2. Reavis *v.* Moore, (Tex. Civ. App.) 20 S. W. Rep. 955.

3. And a judgment may be rendered in his favor, even though it inures to the benefit of the plaintiff who has not presented his claim. Boehm *v.* Calisch, (Tex.) 3 S. W. Rep. 293.

4. Wells *v.* Columbia Nat. Bank, 6 Wash. 621, 34 Pac. Rep. 160.

The plaintiff in such cases may, if he sees fit, release the attachment without becoming liable to the intervening lienors. Wells *v.* Columbia Nat. Bank, 6 Wash. 621, 34 Pac. Rep. 160.

Plaintiff may dismiss attachment regardless of intervention.—The attaching creditor has a right to dismiss the attachment without prosecuting the same to judgment, and this right to dismiss is not affected by the fact that a third person has intervened for the purpose of claiming the ownership of the property. Meyers *v.* Birotte, 41 La. 745, 6 So. Rep. 607.

5. Bamberger *v.* Halberg, 78 Ky. 376; Kelly *v.* Whiting, 51 How. (N. Y.) Pr. 201; State *v.* McKellop, 40 Mo. 184.

But in Texas, the *trustee* who is empowered by the trust deed to "take immediate possession of the goods, wares and merchandise" can intervene and assert his right to the property, although he has not yet taken actual possession. Willis *v.* Thompson, (Satterfield) 85 Tex. 301, 20 S. W. Rep. 155.

6. Bodwell *v.* Heaton, 40 Kan. 36, 18 Pac. Rep. 901; Langert *v.* Brown, 3 Wash. T. 102, 13 Pac. Rep. 704; Mitcham *v.* Schuessler, 98 Ala. 635, 13 So. Rep. 617; Applewhite *v.* Harrell Mill Co., 49 Ark. 279, 5 S. W. Rep. 292; Rentfrow *v.* Lancaster, (Tex. Civ. App.) 31 S. W. Rep. 229.

A mortgagee in possession of chattels may intervene in an attachment suit without surrendering to the officer. Applewhite *v.* Harrell Mill Co., 49 Ark. 279, 5 S. W. Rep. 292.

Necessary proof by mortgagee.—On the trial of the mortgagee's right to attached property he can not defeat a judgment for the plaintiff without showing to the satisfaction of a court that when the attachment was issued he had a valid existing debt secured

ment creditor, whose judgment is a lien upon the property attached, may interplead in the attachment suit and show the invalidity of the same.[1] In states where a person who claims rights in the property other than as an "owner" is permitted to intervene, another attaching creditor may become an intervenor in the former attachment and establish the rights of his own by showing that the first was not warranted by law. But he can not show mere irregularities in the former attachment proceedings.[2] He can only make such objections as go to the jurisdiction of the court.[3] And the *prima facie* proof which the law recognizes as sufficient to authorize his attachment, is also sufficient to maintain his intervention. He is not required to make such proof as would sustain a final judgment in his behalf.[4] He is so far a party to the suit as to be bound by a judgment in the other's favor.[5] But where a statute requires that an intervener be a "person claiming property," and the same be construed to mean one who claims to

on the property by mortgage. Mitcham *v.* Schuessler, 98 Ala. 635, 13 So. Rep. 617. See further as to "proof," *post*, § 437.

1. Schilling *v.* Deane, 36 Ill. App. 513.

But a subsequent judgment creditor can not, by intervention, attack the prior attachment. Leppel *v.* Beck, 2 Colo. App. 390, 31 Pac. Rep. 185.

2. *Ante*, § 411.

3. Rice *v.* Dorrian, 57 Ark. 541, 22 S. W. Rep. 213; Nenney *v.* Schlutmer, 62 Tex. 327; Grabenheimer *v.* Rindskoff, 64 Tex. 49; Breslauer *v.* Geilfuss, 65 Wis. 377; Nassauer *v.* Techner, 65 Wis. 388; Sanger *v.* Tramwell, 66 Tex. 361, 1 S. W. Rep. 378; Bateman *v.* Ramsey, 74 Tex. 589; In Matter of Bonaffe, 33 Barb. (N. Y.) 469; In Matter of De Peyster, 5 Cow. (N. Y.) 266; Orr & Lindsley Shoe Co. *v.* Harris, 82 Tex. 273, 18 S. W. Rep. 308.

A plaintiff in garnishment proceedings has no lien upon property, and therefore can not intervene in an attachment suit. Noyes *v.* Brown, 75 Tex. 458, 13 S. W. Rep. 36.

4. H. B. Claflin Co. *v.* Feibelman, 44 La. Ann. 518, 10 So. Rep. 862.

5. Wallace *v.* Berry, 51 Vt. 602.

May intervene in federal court.—One having sued out an attachment in a state court and being prevented from taking possession of the property because of the same being in the possession of the United States marshal by virtue of an attachment issuing from the federal court, may intervene in the attachment proceeding in the federal court and have the residue of the proceeds after satisfying the first writ applied upon his claim. Goodbar *v.* Brooks, 57 Ark. 450, 22 S. W. Rep. 96; Gumbel *v.* Pitkin, 124 U. S. 131, 8 Sup. Ct. Rep. 379.

own the property, a claimant under process of attachment or garnishment can not intervene in the prior attachment suit.[1]

A general creditor is not often allowed to intervene, because he is not "interested" in the property so as to be affected by the attachment of it.[2] But in a few instances, not only persons claiming some right in the property, but also persons disputing the validity of the attachment, may intervene when the same is necessary to protect their rights, but he can not defeat the attachment for mere irregularities. It can only be done on account of fraud or other invalidity affecting the jurisdiction of the court.[3]

One who has intervened and taken a nonsuit on the trial of his intervention, can not thereafter intervene in the same cause without leave of court; if he does so his intervention will be stricken from the files.[4] But an intervention dismissed for irregularity is no bar to an interposition of a similar claim after judgment in the attachment.[5]

§ 428. **When claimant may intervene.**—Intervention being the interposition in an attachment suit of a claim to property, it follows that there must be such an attachment suit pending, or such claimant can not *inter*vene. Most statutes prescribe that the intervener must come in before the trial and judgment on the issues between the plaintiff and defendant in the attachment suit.[6] But in a few instances he is permitted to come in

1. Cartwright *v.* Bamberger, 90 Ala. 405, 8 So. Rep. 264.

The remedy in Alabama in such a case will be by a bill in equity to contest the lien of the prior attachment on the ground of fraud. Cartwright *v.* Bamberger, 90 Ala. 405, 8 So. Rep. 264.

2. Crim *v.* Harmon, 38 W. Va. 596, 18 S. E. Rep. 753; Meyer & Sons Co. *v.* Black, 4 N. M. 192, 16 Pac. Rep. 620.

A creditor of a firm, although he be a retired partner of that firm, has no such lien on the property of the firm as will entitle him to intervene in an attachment proceeding brought against the firm, in which proceeding he is not a defendant, he not now being a member of such firm. Stansell *v.* Fleming, 81 Tex. 294, 16 S. W. Rep. 1033.

3. Sannoner *v.* Jacobson, 47 Ark. 31, 14 S. W. Rep. 458; Paine *v.* Holliday, 68 Miss. 298, 8 So. Rep. 676; First Nat. Bank *v.* Cochran, (Miss.) 14 So. Rep. 439; *ante*, § 410.

4. Keiser *v.* Moore, 16 Mo. 179.

5. Benton *v.* Benson, 32 Ga. 354.

6. Whalen *v.* McMahon, 16 Colo. 673,

after judgment is entered in the attachment case, if he does so before a sale is made of the attached property, but not thereafter.[1] On the ground that giving a bond for the release of attached property dissolves the attachment, a third person claiming such attached property must intervene before the giving of such bond, for he can not do so thereafter because the property is no longer in *custodia legis*.[2] Furthermore, a claimant who joins in the execution of a delivery bond waives his right to intervene and object to the insufficiency of the attachment.[3]

26 Pac. Rep. 583; Sherwood *v.* Houston, 41 Miss. 59; Ladd *v.* Cousins, 35 Mo. 513; Paine *v.* Holliday, 68 Miss. 298, 8 So. Rep. 676; Bateman *v.* Ramsey, 74 Tex. 589, 12 S. W. Rep. 285; State *v.* King, 46 La. Ann. 1421, 16 So. Rep. 310.

Intervention on motion for new trial.—On motion for a new trial the defendant filed the affidavit of a third person, stating that affiant owned a half interest in the goods seized, but affiant did not state that he was ignorant of his interest at the time of the trial, though when making the motion the defendant stated that he did not believe the claimant knew of such interest till the trial. The motion was properly denied. Choate *v.* McIlhenny Co., 71 Tex. 119, 9 S. W. Rep. 83.

No intervention after appeal.—After an appeal from a judgment in attachment and an affirmation thereof, it is too late for a claimant of the property to be heard. Chapman *v.* Pittsburg and Steubenville R. R. Co., 26 W. Va. 324.

1. First Nat. Bank *v.* Jasper County Bank, 71 Iowa 486, 32 N. W. Rep. 400; Bicklin *v.* Kendall, 72 Iowa 490, 34 N. W. Rep. 283; Juilliard *v.* May, 130 Ill. 87, 22 N. E. Rep. 477; Roos *v.* Lewyn, 5 Tex. Civ. App. 593, 24 S. W. Rep. 538; Nolan *v.* Deutsch, 23 Mo. App. 1; Walter *v.* Bickham, 122 U. S. 320, 7 Sup. Ct. Rep. 1197.

But after judgment in attachment the claimant can not question the sufficiency of the attachment proceedings. Roos *v.* Lewyn, 5 Tex. Civ. App. 593, 24 S. W. Rep. 538.

2. Dorr *v.* Kershaw, 18 La. 57; Wright *v.* White, 14 La. Ann. 583; Frieberg *v.* Elliott, 64 Tex. 367.

Such property may be again attached. Frieberg *v.* Elliott, 64 Tex. 367; *ante*, §§ 288 and 304.

3. J. I. Case Threshing Machine Co. *v.* Merrill, 68 Iowa 540.

Nor can he be heard in defense against the bond after he has permitted a judgment to be entered in attachment against the property. Miller *v.* Desha, 3 Bush (Ky.) 212; *ante*, § 311.

Possession of property pending intervention.—In New York, after a claim of property has been interposed, the sheriff may not remove the goods, even for the purpose of safe keeping, until the claim is tried. Lisher *v.* Pierson, 2 Wend. (N. Y.) 345.

Possession of property pending appeal by intervener.—An intervener claiming the attached property can not thereafter, by giving a forthcoming bond, get possession of the attached property pending the determination of the proceeding by intervention. Kinnear *v.* Flanders, (Brunell) 17 Colo. 11, 28 Pac. Rep. 327.

That the giving of such a bond be-

The appearance of the defendant does not waive the invalidity of a void attachment, and a third party claiming to own the property may thereafter intervene and have the attachment set aside.[1]

§ 429. **What issues may be determined by intervention.**—An intervener can not defend in the attachment suit in lieu of the defendant and defeat it for irregularities in the proceedings as against such defendant.[2] The only fact that is permitted to be put in issue, in the absence of fraud, is the claimant's right and title to the attached property or his superior privilege in it, and irregularities in the attachment proceedings are not available to him; but whether he is restricted to showing that he is absolute owner of the property, or whether he will be permitted to show that he has a special property therein by virtue of a lien or otherwise, depends upon the breadth of the controlling statute. Intervention is an interlocutory proceeding and the only consequences of a judgment in intervention is the conclusion that the thing in dispute is or is not the property of the claimant.[3] He can not avail himself of such errors as would be simply sufficient for reversal in a direct proceeding, but must confine himself to such objections as he could make if attacking them in an independent collateral action.[4] Some states go further than this and permit an intervener to show that the plaintiff and defendant perpetrated a fraud in combining to have the attachment issued to defeat his pursuit of the property.[5]

fore intervention is an admission of the sheriff's right to seize it. See *ante*, § 311.

One who has intervened in an attachment suit, and appealed from the judgment therein entered against him, has no right to the possession of the property pending the appeal. Edwards *v.* Ellis, 27 Kan. 344.

1. Noyes *v.* Canada, 30 Fed. Rep. 665.

2. Sannoner *v.* Jacobson, 47 Ark. 31; Carter *v.* O'Bryan, (Ala.) 16 So. Rep. 894.

3. Harper *v.* Commercial, etc., Bank, 15 La. Ann. 136; Hawkins *v.* Beer, 37 La. Ann. 53; Gilkerson-Sloss Commission Co. *v.* Bond, 44 La. Ann. 841, 11 So. Rep. 220; Sannoner *v.* Jacobson, 47 Ark. 31; Jones *v.* Franklin, 81 Ala. 161; Moresi *v.* Swift, 15 Nev. 215; Scrivener *v.* Dietz, 68 Cal. 1; Prace *v.* Lee, 49 Ala. 571; Romagosa *v.* Nodal, 12 La. Ann. 341; Hershy *v.* Clarksville Institute, 15 Ark. 128.

4. Dickenson *v.* Cowley, 15 Kan. 269.

5. Desmond *v.* Levy, 12 So. Rep.

Where several attachments are levied upon the same property, the claimant may intervene, and (by executing a bond, payable jointly and severally to the plaintiffs in the attachments) may have his right to the property as against all the attaching creditors tried in the one action.[1]

Under an intervention statute, providing for the assessment of damages when the issues are found for the claimant, the court may, after finding the title to be in the claimant, receive evidence as to the value of goods, even though no formal issue of value is raised by the pleadings.[2]

In Virginia, where the claimant's title is tried in a court of equity, a decree, which holds that the attachment was invalid because the property was not owned by the defendant firm, ends the case, and the court can not retain the cause to determine whether or not a non-resident partner has an attachable interest in the property.[3]

When an intervener alleges that he bought the property of the defendant before the attachment, and plaintiff replies that the sale was to defraud creditors, and prays "judgment against the intervener subjecting said property to the payment of his judgment," the validity of the attachment, as against the intervener, is not thereby put in issue; because the validity of the attachment does not affect the intervener's claim as owner.[4]

(Miss.) 481; Lowenstein *v.* Aaron, 69 Miss. 341, 12 So. Rep. 269; First Nat. Bank *v.* Cochran, (Miss.) 14 So. Rep. 439; Gilkerson-Sloss Commission Co. *v.* Bond, 44 La. Ann. 841, 11 So. Rep. 220.

1. Elser *v.* Graber, 69 Tex. 222, 6 S. W. Rep. 560. As to "Bond," *post*, § 434.

2. Schluter *v.* Jacobs, 10 Colo. 449, 15 Pac. Rep. 813.

3. Kern *v.* Wyatt, 89 Va. 885, 17 S. E. Rep. 549.

4. Markley *v.* Keeney, 87 Iowa 398, 54 N. W. Rep. 251.

Intervener may move to quash.—And where he claims property by a purchase before the attachment issued, he may move to quash the attachment on other grounds than of his ownership; nor need he state his ownership in the affidavit accompanying his petition to be allowed to intervene. Wallace *v.* Maroney, 6 Mackey (D. C.) 221. A motion to dismiss the lien created by attachment was permitted to be made by an intervener after appeal and reversal, at the second trial, where such a motion had been improperly made before the first trial of the issues and not sustained. Being first improperly made, the ruling of the court thereon was not an adjudication of the question then

When land has been attached and a third party intervenes setting up title by deed absolute, after which plaintiff files a replication declaring that the purported deed is only a mortgage, it is the duty of the court to direct an issue. The parties need not be remitted to a court of equity.[1]

§ 430. **Where the issue on intervention to be tried.**—The court having jurisdiction to try the attachment, necessarily has jurisdiction to try all issues subordinate thereto.[2] It was once not an uncommon practice for the attaching officer to summon a jury to try the question of title.[3] But such practice, though not wholly abrogated, has grown into disfavor and such a proceeding is seldom employed.[4]

When the intervention is not an independent proceeding in another court, then, the intervention "coming between" the parties in the attachment suit, the issue raised is necessarily raised in the court in which the attachment suit was pending, unless otherwise provided by law. One statute provides that where property is seized upon a writ issued in a suit brought in another county, and a third person intervenes by filing his affidavit and bond with the sheriff as provided by law, the sheriff shall return such papers to the clerk of the county where the property was seized, and such clerk shall place the cause for the determination of the rights of the parties to the property on the trial docket of the court of his county at the next term, the person claiming the property being the plaintiff, and the sheriff and the plaintiff in the attachment being the de-

presented. Gazan *v.* Royce, 78 Ga. 512, 3 S. E. Rep. 753.

No ex parte motion to dismiss intervention.—When an intervention is properly filed the opposition can procure its dismissal only on a proper exception urged against it. The court is without authority to enter an *ex parte* order. Rareshide *v.* Enterprise Ginning and Manufg. Co., 42 La. Ann. 1195, 8 So. Rep. 582.

1. Laclede Bank *v.* Keeler, 103 Ill. 425.

2. Dreyfus *v.* Mayer, 69 Miss. 282, 12 So. Rep. 267.

3. Magne *v.* Seymour, 5 Wend. (N. Y.) 309; Batchellor *v.* Schuyler, 3 Hill (N. Y.) 386; Rowe *v.* Bowen, 28 Ill. 116.

4. In one case it was held that the sheriff might refuse to deliver the claimant's goods, though a jury had decided in the claimant's favor and an indemnity been offered. Batchellor *v.* Schuyler, 3 Hill (N. Y.) 386.

fendants. Such statute makes it necessary that the trial of the issues raised by the intervention shall be tried in the county where the property is seized, so that a writ of prohibition will issue, if the court of another county attempts to proceed with the trial.[1]

§ 431. When the issue on intervention to be tried.—It is the policy of the law in most states that the issue between the intervener and the attachment plaintiff shall be tried before the trial of the right of attachment between the plaintiff and defendant.[2] In fact it has been said that the claimant is bound to see that his intervention is put in issue and brought to trial,[3] and that he must always be ready to exhibit his evidence, for he can not be permitted to retard the suit.[4] And neither the plaintiff nor defendant in the attachment will be allowed to lose or profit by the intervention of a cause, for which they are not responsible, between the issuing of the writ and the final hearing.[5] But it is said that where the attachment was levied on the ground that the defendant has disposed of his property in fraud of a creditor, and a third person intervene claiming under an assignment for the benefit of creditors, the better practice is for the court to first separately try the issue arising under the attachment affidavit between the plaintiff and the assignor and thereafter to try the issue between the plaintiff and the assignee.[6] In Kentucky, however, the issue on intervention may be tried before the trial between the plaintiff

1. State *v.* Superior Court of Pierce County, 5 Wash. St. 639, 32 Pac. Rep. 553.

2. Richards *v.* Bestor, 90 Ala. 352, 8 So. Rep. 30; Kern *v.* Wyatt, 89 Va. 885, 17 S. E. Rep. 549; Gaines *v.* Page, 15 La. Ann. 108; Yale *v.* Hoopes, 12 La. Ann. 460; New Orleans *v.* Morris, 29 La. Ann. 241.

In Virginia, the claim of the intervener is to be tried by a jury impaneled for that purpose. Anderson *v.* Johnson, 32 Gratt. (Va.) 558.

3. Yale *v.* Hoopes, 12 La. Ann. 460.

4. Gaines *v.* Page, 15 La. Ann. 108.

5. Calvert Lithographing Co. *v.* K. & K. Medical Assn., 61 Mich. 336, 28 N. W. Rep. 111; Detroit Free Press Co. *v.* Drs. K. & K. U. S. M. & S. Assn., 64 Mich. 605, 31 N. W. Rep. 537.

But the issue can not be adjudicated on a rule tried in vacation. New Orleans *v.* Morris, 29 La. Ann. 241.

6. Sanger *v.* Flow, 48 Fed. Rep. 152, 4 U. S. App. 32, 1 Cir. Ct. App. 56; Waples-Platter Co. *v.* Low, 4 Cir. Ct. App. 205, 54 Fed. Rep. 93, 10 U. S. App. 704.

and defendant, or the intervention will be regarded as traversed, even after the issues between the original parties are entirely settled.[1] But in Mississippi a trial of the right of property can not be had until the attachment suit has been prosecuted to judgment against the attachment defendant.[2] For the attachment plaintiff can not prevail in an issue with a third person claiming the attached property, unless he can show judgment against the defendant in attachment. Therefore, the judgment must be first perfected against the original debtor before one could be rendered that the property was liable to satisfy the debt.[3] The determination on intervention in other states being but the intervener's right to the property, and not as to the attachment plaintiff's right to have the attached property for the satisfaction of his demand, there is generally no reason why the judgment on intervention should not be first rendered.

§ 432. **How to intervene—(a) Notice to officer or attaching creditor.**—When a stranger to an attachment suit claims to own or have a special interest in the property attached, which interest will permit him to protect it in an intervention, he is generally required by statute to serve notice of the fact upon the officer making the attachment or upon the attaching creditor, or upon the officer and creditor, that he holds such claim as owner, or otherwise, and that he will seek to enforce his rights by the intervention. The statutes, however, differ so widely in this regard that few general rules can be laid down either as to the general requisites or the service of such notice. It is, however, generally required that the notice should contain a description of the property and should state the nature of the claimant's title. Such notice must generally be made by the claimant, or his attorney, and in most cases the statute requires that it be verified. With these brief suggestions the practitioner is referred to his controlling statute.[4]

1. Taylor *v.* Taylor, 3 Bush (Ky.) 118.

2. Mandel *v.* McClure, 22 Miss. (14 Smed. & M.) 11.

3. Dickman *v.* Williams, 50 Miss. 500; Maury *v.* Roberts, 27 Miss. 225.

4. Carter *v.* Green Mountain Gold Min. Co., 83 Cal. 222, 23 Pac. Rep. 317; Hibbard *v.* Zenor, 75 Iowa 471, 39 N. W. Rep. 714; Stewart *v.* Smith, 60 Iowa 275, 14 N. W. Rep. 310; Hibbard *v.* Zenor, 82 Iowa 505, 49 N. W.

§ 433. (b) **Petition—Affidavit.**—One who desires to intervene must, within the time allowed,[1] present a petition or affidavit, by himself, his agent or attorney, to the court in which the attachment suit is pending.[2] This petition or affidavit must state a claim to the property, or to an interest therein, or a lien thereon, as the case may be.[3] It must describe the property claimed and must be verified on oath.[4] The petition or affidavit required by the statute is jurisdictional,[5] and must therefore be made in strict accordance with the provisions of the controlling statute.[6]

Rep. 63; Kern *v.* Wilson, 82 Iowa 407, 48 N. W. Rep. 919; Wilson *v.* Crooker, 145 Mass. 571, 14 N. E. Rep. 798; Holmes *v.* Balcom, 84 Me. 226, 24 Atl. Rep. 821; Potter *v.* McKenney, 78 Me. 80.

1. *Ante*, § 428.

2. In some states he is permitted to present it to the attaching officer, whose duty it then is to file it with the clerk of the court of the county where the property was seized. State *v.* Superior Court of Mason County, 6 Wash. 417, 34 Pac. Rep. 151.

3. *Ante*, § 429.

4. Taylor *v.* Taylor, 3 Bush. (Ky.) 118; Ludington *v.* Hull, 4 W. Va. 130; Hanness *v.* Smith, 21 N. J. L. (1 Zab.) 495; Carpenter *v.* Bodkin, 36 Minn. 183, 30 N. W. Rep. 453; Hamburg *v.* Wood, 66 Tex. 168, 18 S. W. Rep. 623; Ryan *v.* Goldfrank, 58 Tex. 356; State *v.* Superior Court of Mason County, 6 Wash. 417, 34 Pac. Rep. 151.

5. Mobile Life Ins. Co. *v.* Teague, 78 Ala. 147; Graham *v.* Hughes, 77 Ala. 590.

6. Where the claimant makes oath that his claim is made in good faith, the omission of the *jurat* through inadvertence will not vitiate the proceedings, if they are amended within the proper time. Ryan *v.* Goldfrank. 58 Tex. 356.

When a claimant's affidavit fails to show that the undivided interest he claims is the same as that levied upon, the omission will be immaterial when the proof at the trial shows that the interest levied upon and the interest claimed are identical. Hamburg *v.* Wood, 66 Tex. 168, 18 S. W. Rep. 623.

An affidavit for an intervention may, in Minnesota, be made by an agent, who may state the facts as upon information furnished him by his principal. Carpenter *v.* Bodkin, 36 Minn. 183, 30 N. W. Rep. 453.

Substantial compliance with the requirements of the statute are sufficient, in Minnesota, where the affidavit of the intervener is made in good faith for the purpose of complying therewith, and when treated as sufficient by the affiant, the sheriff and the plaintiff, it will serve the purpose for which it is intended, although in fact literally defective. Carpenter *v.* Bodkin, 36 Minn. 183, 30 N. W. Rep. 453.

A statement in the affidavit that the claimant is the "owner" is a sufficient averment of the ground of his title or right of possession. Carpenter *v.* Bodkin, 36 Minn. 183, 30 N. W. Rep. 453.

The pleading of the claimant is, in nearly every instance, confined to the "petition" or "affidavit" (as the case may be); it serves the purpose of a complaint or declaration, and, as the issue is to be joined thereon, the averments therein are matters of utmost importance. The averments contained in the pleadings in an intervention will, of course, be governed by the issues that the statute will permit to be tried by intervention.[1] Where the only issue is the fact of the ownership, the claimant can not traverse the affidavit for attachment,[2] nor can he plead in abatement to the writ.[3] He has no part in the issues between the attachment plaintiff and the attachment defendant. The fact of his own title is the question to be tried, and his pleadings are confined thereto.[4] Where the intervener claims title, an allegation that he is the owner is sufficient, but in states where one claiming less than an absolute title may also intervene, the intervener's complaint must state the nature of the claim to the property, "whether absolute or conditional."[5] Where the claimant avers that he is the owner of personal property, by virtue of a sale to him before the attachment, and the attachment creditor does not plead fraud in such purchase, the claimant may recover by showing the execution and delivery of the bill of sale to him and the taking of possession of the property thereunder, even though there be evidence tending to show fraud.[6] Fraud, to be available as a matter of de-

1. *Ante*, § 428.

2. Landauer *v.* Vietor, 69 Wis. 434, 34 N. W. Rep. 229.

3. McKenzie *v.* Ransom, 22 Vt. 324.

4. The issue as to whether the property can be taken from the possession of the claimant, is raised by an averment that at the time of the levy the property was his, and in his possession and control, and that he was entitled to hold the same free from seizure. Emerson *v.* First Nat. Bank, (Tex. Civ. App.) 25 S. W. Rep. 433.

5. Maus *v.* Bome, 123 Ind. 522, 24 N. E. Rep. 345.

6. Mayer *v.* Texas Brewing Co., (Tex. Civ. App.) 26 S. W. Rep. 774. When he avers that he bought the property levied upon prior to the attachment, and paid a certain consideration therefor, he can sustain his claim by proof that the consideration paid on such purchase was a debt due from the attachment debtor. Hamburg *v.* Woods, 66 Tex. 168, 18 S. W. Rep. 623.

Where the intervener claims as assignee for the benefit of creditors, his failure to file a deed of assignment is not ground for a demurrer to his petition, but only for a motion for a more specific averment. Sanger *v.* Flow, 4 U. S. App. 32, 1 Cir. Ct. App. 56, 48 Fed. Rep. 152. As to assignee not

fense, must be pleaded.[1] When the intervener alleges ownership of the personal property seized, the attaching creditor may plead fraud, "and the court shall try and decide the issue thus made."[2]

The claimant must aver his right to the part of the attached property which he owns, for if he claims the whole, and be not able to sustain title as to a part, because of fraud in the confusion of goods, he will be entitled to no relief.[3]

Where an intervener may put in a claim which does not directly involve the title to the land on which the attachment was made (and this he may do in some states),[4] a good rule to govern himself by is that he shall allege such facts as would authorize a court of equity to grant him a writ of injunction.[5] Intervention being essentially a proceeding to try the "right" to property seized under attachment, the law does not contemplate that the validity of the writ should be contested except by special allegation pointing out the grounds relied on for its invalidity. In such cases a general denial of the validity of the plaintiff's attachment will not be sufficient. He should point out the particular defect in the levy, and allege particular acts of invalidity—as that the plaintiff's debt was fictitious, or that his attachment was otherwise fraudulent.[6]

§ 434. (c) **Bond.**—A claimant is not generally permitted to intervene by mere motion for the purpose of assailing a prior attachment. He is generally required, in addition to his

properly intervening in Missouri see Boltz *v.* Eagon, 34 Fed. Rep. 452.

1. *Contra* First Nat. Bank *v.* Kansas, etc., Co., 43 Mo. App. 561.

2. Lahitte *v.* Frere, 42 La. Ann. 864, 8 So. Rep. 598.

3. Blotcky *v.* Caplan, (Iowa) 59 N. W. Rep. 204. Compare, *ante*, § 399.

4. *Ante*, § 429.

5. Whitman *v.* Willis, 51 Tex. 421.

6. Latham *v.* Selkirk, 11 Tex. 314; Ft. Worth Pub. Co. *v.* Hitson, 80 Tex. 216, 16 S. W. Rep. 551; Espenhain *v.* Meyer, (Steinkirchner) 74 Wis. 379, 43 N. W. Rep. 157; Martin Clothing Co. *v.* Page, 1 Tex. Civ. App. 537, 21 S. W. Rep. 702; Hall & Brown Wood Working Mach. Co. *v.* Brown, 82 Tex. 469, 17 S. W. Rep. 715; Publishing Co. *v.* Hitson, 14 S. W. Rep. 843, 16 S. W. Rep. 551 and 80 Tex. 234; Davis *v.* Dallas Nat. Bank, (Tex. Civ. App.) 26 S. W. Rep. 222.

But in Missouri he may do so under general denial of the validity of the attachment. First Nat. Bank *v.* Kansas City, etc., Co., 43 Mo. App. 561.

petition or affidavit, to give security for costs, which is usually by a bond conditioned to pay all such costs and damages as may be recovered because of delay, or otherwise, occasioned by such intervention.[1] A dismissal of the intervener's claim because of failure to file the affidavit required, or for any other reason, is a breach of the bond which will render the sureties thereon liable for all damages and costs against the claimant.[2]

In the absence of special statute, however, the court has no jurisdiction on the trial of the attachment, or intervention, to render judgment for the amount of the plaintiff's recovery against the principal and sureties on the bond, where no process has been issued to them and none of them have appeared.[3] The attaching creditor will be relegated to an action on the bond.

On the dismissal of an intervention without a trial on the merits (for the reason that the claimant's bond was not filed in time), where the claimant makes no further effort to establish his right of property, there will be merely a judgment for costs; but the attaching creditor can, nevertheless, recover damages in a suit on the bond, the property being in the claimant's hands, not returned to the plaintiff.[4] Where the property, or the value of the property, taken by an intervening claimant from an attaching creditor is not returned on the dismissal of the intervention, and the same exceeds the amount of the at-

1. Ludington *v.* Hull, 4 W. Va. 130; Higdon *v.* Vaughn, 58 Miss. 572; McElrath *v.* Whetstone, 89 Ala. 623, 8 So. Rep. 7; Ft. Worth Pub. Co. *v.* Hitson, 80 Tex. 216, 234, 14 S. W. Rep. 843, 16 S. W. Rep. 551; Williams *v.* Barnwell, 78 Tex. 326, 14 S. W. Rep. 784; Wallace *v.* Terry, 15 S.W. Rep. 35.

This bond given by an intervener who seeks to have his claim adjudicated must not be confounded with the bond which a claimant may give to the sheriff to procure the release of attached property. Comer *v.* Reid, 93 Ala. 391, 9 So. Rep. 620; Kohn *v.* Hinshaw, 17 Ore. 308, 20 Pac. Rep. 629; Elser *v.* Graber, 69 Tex. 222, 6 S. W. Rep. 560; Peters Saddlery and Harness Co. *v.* Schoelkopf, 71 Tex. 418, 9 S. W. Rep. 336; *ante*, § 286.

2. Higdon *v.* Vaughn, 58 Miss. 572; McElrath *v.* Whetstone, 89 Ala. 623, 8 So. Rep. 7; Ft. Worth Pub. Co. *v.* Hitson, 80 Tex. 216, 234, 14 S.W. Rep. 843, 16 S. W. Rep. 551.

3. Williams *v.* Barnwell, 78 Tex. 326, 14 S. W. Rep. 784.

4. Wallace *v.* Terry, (Tex.) 15 S.W. Rep. 35.

taching creditor's claim, the measure of damages, in an action on the bond, is limited to the amount of such demand.[1]

§ 435. **Parties defendant.**—When a claimant seeks to have his rights adjudicated on intervention, the issue is in most cases between him and the party alone who makes the seizure, in which case the person making the attachment is alone to be made party defendant on the intervention.[2] But where a statute provides for the adjudication of the rights of all persons claiming an interest in the property, then all persons whose interests are to be affected by the judgment or decree in intervention should be made parties defendant in the proceeding.[3]

§ 436. **Answer or replication to intervener.**—When a petition or affidavit is filed by a claimant on intervention, the attachment plaintiff (or officer) must answer such petition; for an unanswered claim of the property in dispute will be taken as true.[4] The petition filed by the claimant stands on the same footing as any other petition or complaint, and the answer of the attaching creditor thereto should be in writing in cases in which written pleadings are required.[5] The issue tendered by the attachment plaintiff in his replication to the intervention

1. Wallace *v.* Terry, (Tex.) 15 S. W. Rep. 35.

When intervener may sue on an attachment bond.—It is the general rule that only the attachment defendant can bring an action on an attachment bond. *Ante*, § 182. But in a case where a third person intervened and claimed the attached property, and an attachment bond was given for his benefit, it was held proper that he should sue on the bond. State *v.* Merritt, 70 Mo. 275.

2. Gerson *v.* Jamar, 30 La. Ann. Part II, 1294.

3. Cook *v.* Pollard, 70 Tex. 723, 8 S. W. Rep. 512.

4. Williams *v.* Vanmetre, 19 Ill. 293.

But no default judgment can be entered for the restoration of the property in favor of one who is not properly and accurately before the court as an intervener. Boltz *v.* Eagon, 34 Fed. Rep. 452.

The plaintiff's answer need not allege an indebtedness of the attachment defendant, in Missouri, when the same is admitted by the intervener's plea. Meyberg *v.* Jacobs, 40 Mo. App. 128.

5. Rosewater *v.* Schwab Clothing Co., 58 Ark. 446, 25 S. W. Rep. 73.

As to plea in abatement to the intervention, see Blum *v.* Addington, (Tex. Sup.) 9 S. W. Rep. 82; Carpenter *v.* First Nat. Bank, (Tex. Sup.) 20 S. W. Rep. 130.

may be amended, even at the trial thereof, if such amendment does not result in surprise prejudicial to the intervener.[1]

The attachment defendant need not disclaim a right of property in the land attached, to enable the intervener to claim such right of property.[2] On intervention there is no more of an issue raised between the attachment defendant and the intervener than there is between the attachment plaintiff and attachment defendant.

§ 437. **Proof.**—The proof on the trial of the issue raised by intervention is governed by the same rules that govern the introduction of proof in other cases, but the rules are differently applied in different states, because of the difference of doctrine in such states. Intervention is sometimes considered in the nature of an independent proceeding in which the claimant is plaintiff, and is elsewhere considered in the nature of a plea denying the rights of the attachment plaintiff. When intervention is deemed to be in the nature of an independent proceeding, the burden of proof is upon the claimant in the first instance to establish his right and title in the property claimed, and this he must do by a preponderance of evidence.[3] When the intervention is deemed to be a denial of the attachment plaintiff's right to hold the property, then the burden of proof rests upon the attachment plaintiff to show a levy of a valid process and *prima facie* ownership in the attachment defendant before it is necessary for the claimant to introduce any evidence.[4] When the intervener asserts ownership, the burden of

1. Ft. Worth Pub. Co. *v.* Hitson, 80 Tex. 216, 234, 14 S.W. Rep. 843, 16 S.W. Rep. 551; Graves *v.* Hall, 27 Tex. 148.

In the case of Ft. Worth Pub. Co. *v.* Hitson he was allowed to amend his statement of claim so that it would correspond to the amount stated in the writ.

2. Bennett *v.* Wolverton, 24 Kan. 284.

3. Ellis *v.* Allen, 80 Ala. 515, 2 So. Rep. 676; Wallace *v.* Robeson, 100 N. C. 206, 6 S. E. Rep. 650; Wilson *v.* Lucas, 78 Tex. 292, 14 S. W. Rep. 690; Boller *v.* Cohen, 42 Mo. App. 97; Toney *v.* Goodley, 57 Mo. App. 235; Kirschen-

When the attached property is not taken from the possession of the claimant, the claimant then, in Texas, under statute, has the burden of proof. Pierson *v.* Tom, 10 Tex. 145.

4. Jackson *v.* Bain, 74 Ala. 328; Mandel *v.* McClure, 22 Miss. (14 Smed. & M.) 11; Boaz *v.* Schneider, 69 Tex. 128, 6 S. W. Rep. 402; Brown *v.* Lessing, 70 Tex. 544, 7 S. W. Rep. 783; Traders' Nat. Bank *v.* Day, (Tex. Civ. App.) 27 S. W. Rep. 264; Bernheim *v.* Dibrell, (Miss.) 11 So. Rep. 795.

proof is on him to establish it, but when he denies the validity of the attachment the burden is upon the attachment plaintiff to support his attachment.[1]

Whoever has the burden necessarily has the right to open and close.[2]

1. Parlin & Orendorff *v.* Spencer, 51 Kan. 632, 33 Pac. Rep. 363.

Although the attachment plaintiff be deemed to have the burden of proof, it will, if he denies the validity of the assignment under which the intervener claims, throw the burden of showing its validity upon the intervener. Sanger *v.* Flow, 4 U. S. App. 32, 1 Cir. Ct. App. 56, 48 Fed. Rep. 152.

After judgment in attachment one who claims to hold under such judgment has the burden of proving its validity when that judgment is questioned either directly or incidentally. Edwards *v.* Toomer, 22 Miss. (14 Smed. & M.) 75.

2. Sanger *v.* Flow, 4 U. S. App. 32, 1 Cir. Ct. App. 56, 48 Fed. Rep. 152; Parlin & Orendorf Co. *v.* Spencer, 51 Kan. 632, 33 Pac. Rep. 363.

Admissibility of evidence.—The admissibility of evidence on intervention is governed by the same general rules that control in other cases, and whether or not evidence is admissible depends upon the issue to be proven, but the issue on intervention is in some respects so unusual that particular decisions are deemed to be of a special value and are therefore briefly included hereunder.

Admissibility of evidence to prove title. — Where plaintiff, having the burden of proof, has made a *prima facie* case and the claimant desires to disprove the same, evidence may be introduced to show transfers of title to him, after which the plaintiff may show in rebuttal that before the attachment, defendant mortgaged the property to another creditor with the claimant's knowledge and consent; and this he may do without producing the mortgage. Roberts *v.* Burgess, 85 Ala. 192, 4 So. Rep. 733.

In order to prove that the property was the attachment defendant's, the attachment plaintiff may trace the title from the original owner down to the attachment defendant and may show the character of the possession of the assignor who was in actual possession to assign the property to the claimant; and any evidence as to the assignor's authority to convey, or as to the consideration paid, will be admissible. Elliott *v.* Stocks, 67 Ala. 290.

Admissibility of evidence to prove fraud.—One who claims as a purchaser of attached property need not prove his good faith. The burden of disproving it is on the attachment plaintiff. Stephens *v.* Oppenheimer, 45 Ark. 492. And in Missouri he may do this on a general denial of the validity of the attachment. First Nat. Bank *v.* Kansas City Lime Co., 43 Mo. App. 561. See *ante*, § 436. But a judgment entered by default against the defendants in the attachment suit, on the ground of fraudulent disposition of property, is not *prima facie* evidence that the sale to the claimant was fraudulent. Ott *v.* Smith, 68 Miss. 773, 10 So. Rep. 70.

When fraud on the part of the attachment defendant is in issue, such fraud can not be shown in Mississippi by evidence of his connection with

§ 438. **Instructions to the jury.**—The instructions to the

certain commercial agencies, and by his rating or want of rating in such agencies, unless the same is directly associated with the facts on which the rating or want of rating was based. Lowenstein *v.* Aaron, 69 Miss. 341, 12 So. Rep. 269.

When the transfer from the attachment defendant to the claimant is attacked for fraud, the defendant may be properly interrogated concerning the debits and credits going to make up the consideration on which the transfer was based. This is relevant because the good faith of the attachment defendant and the intervener is involved in the issue. Deere *v.* Wolf, 77 Iowa 115, 41 N. W. Rep. 588.

When the intervener claims the attachment was fraudulent he will not, in support of such claim, be permitted to offer in evidence statements made by the attachment defendant after the attachment issued. Freiberg *v.* Freiberg, 74 Tex. 122, 11 S. W. Rep. 1123.

Admissibility of evidence—The judgment in attachment.—Where a lien will support an intervention before such lien is foreclosed and becomes a right of property, the judgment in the attachment proceeding is admissible as against the intervener's claim to the property, although the judgment does not show a condemnation of the property. Wallace *v.* Bogel, 66 Tex. 572, 2 S. W. Rep. 96; Harris *v.* Daugherty, 74 Tex. 1, 11 S. W. Rep. 921.

In Mississippi when judgment in attachment is admissible in evidence between the intervener and the attachment plaintiff, the judgment is part of the record and need not be offered in evidence. French *v.* Sale, 60 Miss. 516.

Admissibility of evidence—The files in the attachment case.—The affidavit in attachment is not admissible in evidence when the claimant avers that he purchased the property prior to the attachment. Dollins *v.* Pollock, 89 Ala. 351, 7 So. Rep. 904.

But where the validity of the attachment is in issue, the affidavit is admissible in evidence if it is not void, notwithstanding it may be irregular. Guy *v.* Lee, 81 Ala. 163.

When the intervener claims a right to the possession of the property (as distinguished from the ownership of the property) the writ of attachment is admissible in evidence, in Texas, without showing the affidavit and bond. The writ being regular on its face, it is presumed to have been properly issued. Harris *v.* Dougherty, 74 Tex. 1, 11 S. W. Rep. 921.

On the trial of the right of property in Alabama, the claim bond given by the claimant, for the attached property, is admissible in evidence *for* damages for breach of warranty of title in the sale of personal property. Guy *v.* Lee, 81 Ala. 163, 2 So. Rep. 273.

Admissibility of evidence—Ex parte affidavit.—In the trial of the right of property, an *ex parte* affidavit concerning statements made by still another person regarding the ownership of property, is inadmissible. Hyatt *v.* Leslie, (Miss.) 10 So. Rep. 672.

Admissibility of evidence—Letters.—On the trial of a claim to the property by a wife under transfer by one of the members of the defendant firm, a letter from the firm to the wife's attorney, in which the firm's indebtedness to her is admitted, may be offered in evidence, where it is not shown that the attaching creditor's debt was contracted before the date of the letter. Bell *v.* Kendall, 93 Ala. 489, 8 So. Rep. 492.

Admissibility of evidence—Invoice.—

jury should, of course, be confined to a general statement of

On the trial of the right to property attached while intermingled with other property, when the intervener claims under a chattel mortgage previously executed, where the court has instructed that the claimant is not entitled to recover for goods acquired after the execution of the mortgage, and where there has been testimony as to the original stock and after acquired goods, the invoice of all the goods levied upon taken the day after the seizure, is admissible in evidence. Kern *v.* Wilson, 82 Iowa 407, 48 N. W. Rep. 919.

Admissibility of evidence—Declarations.—On a trial of the right of property, declarations made by the defendant to the officer at the time of the levy, stating that the property did not belong to him, is admissible. Wright *v.* Smith, 66 Ala. 514.

Admissibility of evidence—Prior transactions.—On the trial of the right of property, transactions between the attachment defendant and the intervener before the time of the levy are competent evidence; but transactions subsequent thereto are not; because they are outside of the issue at the time the interposed claim must have taken effect. Wollner *v.* Lehman, 85 Ala. 274, 4 So. Rep. 643; Foster *v.* Goodwin, 82 Ala. 384, 2 So. Rep. 895. But the admission of such evidence will not be reversible error. It is merely immaterial. Wilson *v.* Lucas, 78 Tex. 292, 14 S. W. Rep. 690.

Sufficiency of evidence.—The intervener's claim to the property taken on attachment need not be proved beyond a doubt. Wollner *v.* Lehman, 85 Ala. 274, 4 So. Rep. 643.

A *prima facie* case of ownership not contradicted will necessitate a finding for the intervener, and although a demurrer to the evidence might have been sustained, yet subsequent evidence sufficient to make a *prima facie* case will suffice. Baer *v.* Groves, 46 Mo. App. 245.

In Alabama, to show a right of property in goods attached, he may show a title on which he could support trover, trespass or detinue. Block *v.* Maas, 65 Ala. 211.

Testimony by the claimant that the attached goods was his, and that he so notified the sheriff before the levy was made, will sustain a verdict, although there is other evidence showing that he was present at the levy and was called on by the sheriff to witness the seizure, and then made no claim to the goods. Tillman *v.* Fletcher, 78 Tex. 673, 15 S. W. Rep. 161.

Where the validity of the writ is not attacked by special plea, the writ itself is sufficient evidence of its validity. Yarborough *v.* Weaver, (Tex. Civ. App.) 22 S. W. Rep. 771.

On the trial of an intervention after the claimant has proven his title, he may sufficiently prove a conversion by introducing in evidence the officer's return, showing that he took possession of certain chattels under the writ and had them sold prior to the trial of the issue on intervention. Schluter *v.* Jacobs, 10 Colo. 449, 15 Pac. Rep. 813.

After the introduction of evidence that the attached property was fraudulently conveyed by the attachment defendant to the claimant, the same not being disproven, it will be error to direct a verdict for the claimant. St. Louis Wire Mill Co. *v.* Lindheim, (Tex. App.) 18 S. W. Rep. 675.

the issues.[1] It should consist of a brief statement of the plaintiff's right to levy on the property and the nature of the intervener's claim. But an instruction should not authorize a verdict for money, because the only question for trial is the right of property.[2] Although the claimant may not have the burden of proof when the good faith of a purchase is in issue, an instruction that the intervener must show by a preponderance of evidence that he is the owner, and that if he purchased and paid for the property in good faith, and had no intent to defraud creditors, the sale was invalid, otherwise it was valid, is proper.[3]

§ 439. **Findings—Verdict.**—On a trial of the intervention, the verdict should be whether the attachment property belongs to the intervener.[4]

Where the intervener has established his right to the property, a general verdict for the claimant will be sufficient, but where it is shown (in cases where absolute ownership is not essential to intervention) that the claimant has only a particular right to the property, as for example that of a partner, or

1. The charge that the intervener can not recover if the sale was made by the attachment defendant to an innocent purchaser without knowledge, is improper when the sale is no part of the issue. Wollner *v.* Lehman, 85 Ala. 274, 4 So. Rep. 643.

2. Rindskoff *v.* Rogers, 34 Mo. App. 126.

Where the intervener in his pleadings makes no averment regarding a half interest in the attached property, it is proper to refuse a charge concerning such half interest. Choate *v.* McIlhenny Co., 71 Tex. 119, 9 S. W. Rep. 83.

3. Martin *v.* Davis, 76 Iowa 762, 40 N. W. Rep. 712.

The *bona fides* of a sale being in issue, an erroneous charge that the claimant was in possession of the property at the time of the levy is prejudicial. City of What Cheer *v.* Hines, 86 Iowa 231, 53 N. W. Rep. 126.

Where the evidence shows that the attachment defendant was indebted to the plaintiff at the time a transfer was made to the claimant, an affirmative instruction to find for the claimant is error. Yarborough *v.* Weaver, (Tex. Civ. App.) 22 S. W. Rep. 771.

Further, as to what instructions have been permitted in cases depending upon particular circumstances, see Zeiner *v.* Mims, 96 Ala. 285; Brunswick *v.* Mims, 11 So. Rep. 302; Cornforth *v.* Maguire, 12 Colo. 432, 21 Pac. Rep. 191; Deere *v.* Wolf, 77 Iowa 115, 41 N. W. Rep. 588; Freiberg *v.* Freiberg, 74 Tex. 122, 11 S. W. Rep. 1123; Chambers *v.* Meaut, 66 Miss. 625, 6 So. Rep. 465; State *v.* Crowder, 40 Mo. App. 536.

4. Hewson *v.* Tootle, 72 Mo. 632; S. Albert Grocer Co. *v.* Goetz, 57 Mo. App. 8.

that the attachment defendant has also an interest in the property, a finding in general terms for the claimant will be erroneous.[1] The verdict should find the extent of his interest, and direct payment of the proceeds of the property to the extent thus found.[2]

§ 440. **Judgment—Damages—Costs.**—The judgment records of the proceedings on intervention should be kept distinct from the records of the proceedings in the attachment suit.[3]

And judgment on the main issues, between the plaintiff and defendant, should, in general, be held in abeyance until the issue, as to the property right raised by the intervention, is determined, after which (if judgment is entered against the claimant), the attachment case should proceed to judgment on its own merits. A judgment can not be entered in the attachment case on the mere determination of the property right, particularly where the defendant has only made a special appearance.[4]

The judgment usually entered is that the intervention be dismissed with costs assessed against the claimant,[5] but, in Alabama, when the issues are decided against the claimant, the attachment plaintiff is entitled to a judgment that the property is subject to his attachment and to the satisfaction of his judgment, if obtained, or, if one shall be obtained, although the attachment may not have proceeded to judgment at that time.[6]

1. Columbia Bank *v.* Spring, 55 N. J. Law 245, 26 Atl. Rep. 711; Hoxie *v.* Sutter, 76 Iowa 764, 40 N.W. Rep. 723; Wear *v.* Sanger, 91 Mo. 348, 2 S. W. Rep. 307.

2. Nelson Distilling Co. *v.* Hubbard, 53 Mo. App. 23.

3. Brennan *v.* O'Driscoll, 33 Mo. 372.

4. Abraham *v.* Nicrosi, 87 Ala. 173, 6 So. Rep. 293.

Where the property is found to belong to the intervener, no judgment can be rendered against the attachment defendant, unless there has been personal service of process. Ireland *v.* Webber, 27 Ind. 256.

5. In Texas judgment by default will be entered against him if he does not appear and join issue "within the time prescribed" for pleading. Martin *v.* Hartnett, (Tex.Civ.App.) 24 S.W. Rep. 963, 25 S. W. R. 1115, s. c. 86 Tex. 517.

6. Roberts *v.* Burgess, 85 Ala. 192, 4 So. Rep. 733.

As to the requisites of a judgment in Arkansas, see Adams *v.* Hobbs, 27 Ark. 1.

In Texas, by force of special statute,

The judgment only determines the right of property as between the intervener and the attachment plaintiff.[1] A judgment against the claimant will preclude him from thereafter maintaining replevin against the officer,[2] but a judgment in favor of the claimant will not be conclusive as to the ownership of the property.[3] A judgment in favor of the intervener will operate as a dismissal of the attachment in the absence of proof of other property within the jurisdiction of the court, and will

the judgment, when claimant of property fails in his claim, shall be against him for the value of the property and shall fix the amount of each one's claim; if there is but one plaintiff, judgment should fix the amount of his claim as the value of the property, and execution shall issue for the amount of claim or claims. Martin *v.* Hartnett, 26 S. W. Rep. 945, 86 Tex. 674; Wetzel *v.* Simon, (Tex. Civ. App.) 25 S. W. Rep. 792; s. c. 26 S. W. Rep. 642; Ft. Worth Pub. Co. *v.* Hitson, 80 Tex. 216, 14 S. W. Rep. 843, 16 S. W. Rep. 551; Blankenship *v.* Thurman, 68 Tex. 671, 5 S. W. Rep. 836; Heidenheimer *v.* Johnson, 76 Tex. 200, 13 S. W. Rep. 46.

When the attachment plaintiff receives money belonging to the intervener, the intervener may recover interest from the time the attachment creditor received the money. Heidenheimer *v.* Johnson, 76 Tex. 200, 13 S. W. Rep. 46.

But he can not recover interest on the damages as well as on the value of the property. Floege *v.* Wiedner, 77 Tex. 311, 14 S. W. Rep. 132.

A judgment against the claimant shall be unconditional, but may be satisfied by a return of the property. Floege *v.* Wiedner, 77 Tex. 311, 14 S. W. Rep. 132.

And when the verdict against the claimant is that he has failed to establish his right to the property, and that its value is a certain sum, it is sufficient to warrant judgment in favor of the attaching creditor. Floege *v.* Wiedner, 77 Tex. 311, 14 S. W. Rep. 132.

1. The judgment can not bind parties who have not been brought in and their rights determined. Wilde *v.* Paschen, 67 Wis. 90.

But another attaching creditor who has intervened is so far a party as to be bound by a judgment in the other's favor. Wallace *v.* Berry, 51 Vt. 602.

Judgment in favor of the intervener, a subsequent attaching creditor, who alleges fraud in a prior attachment (in a state where a lien is sufficient to support an intervention), can not be that the intervener's claim be satisfied in full out of the property attached, because it would ignore the lien of nonintervening attachment creditors. Cook *v.* Pollard, 70 Tex. 723, 8 S. W. Rep. 512.

Judgment by default.—On an intervention between the claimant and the attachment plaintiff, especially after a change of venue is taken by stipulation between them, a judgment by default can not be entered against a defendant in attachment who has only entered a special appearance. Talpey *v.* Doane, 3 Col. 22.

2. Bray *v.* Saaman, 13 Neb. 518.

3. State *v.* Gillespie, 9 Neb. 505.

Nor will the fact that the grantee has appeared by an intervener's petition in an attachment proceeding, on

release the property claimed by the intervener.[1] But if he wishes to be quieted in his title, he must have recourse to a direct action.[2]

Costs and damages may be awarded to the claimant when he prevails in his intervention. This is usually the compensation for the wrong and injury done him, although damages are not specially claimed in the petition.[3] In Colorado, the damages recoverable, when the property has been sold under the attachment, is limited to the value of the property at the time of the levy, with interest to date.[4] When the intervener fails to support his claim and his intervention is dismissed, costs occasioned by the intervention will be taxed against him.[5]

the ground of fraudulent conveyance, be such an appearance in the attachment suit as to cause a judgment in attachment to divest such grantee of his title. Kimbro *v.* Clark, 17 Neb. 403.

1. Simonds *v.* Pearce, 31 Fed. Rep. 137.

2. Meyers *v.* Birotte, 41 La. Ann. 745, 6 So. Rep. 607.

But it is also said that judgment in favor of the intervener is conclusive that the debtor has no title in the goods attached. Simonds *v.* Pearce, 31 Fed. Rep. 137.

3. Turner *v.* Lytle, 59 Md. 199; Matter of St. John, 6 Hill (N. Y.) 356; Frank *v.* Chaffe, 34 La. Ann. 1203.

4. Brasher *v.* Holtz, 12 Colo. 201, 20 Pac. Rep. 616; Cornforth *v.* Maguire, 12 Colo. 432, 21 Pac. Rep. 191.

In Texas, the claimant and his bondsmen are only liable in damages to the amount of ten per cent. on the value of the property at the time of the levy, when his claim equals the value of the property; and when the claim is greater or less than the property, then on the amount claimed. Dupree *v.* Woodruff, (Tex. Sup.) 19 S. W. Rep. 469; Harris *v.* Schuttler, (Tex. Civ. App.) 24 S. W. Rep. 989; Gilmour *v.* Heinze, 85 Tex. 76, 19 S. W. Rep. 1075.

5. Kinnear *v.* Flanders Brunell, 17 Colo. 11, 28 Pac. Rep. 327.

CHAPTER XX.

INCIDENTAL MATTERS OF PLEADING AND PRACTICE.

§ 441. General rules can not be formulated.
(a) Concerning the declaration or complaint.
442. (b) Concerning entry and notice of appearance.
443. (c) Concerning an affidavit of merits.
444. (d) Concerning demurrers.
§ 445. (e) Concerning pleas in abatement.
446. (f) Concerning "traverse," "pleas to the merits," or plea in bar of the action.
447. Plaintiff may continue suit after assignment.
448. Where jury trials in attachment to be had.

§ 441. General rules can not be formulated—(a) Concerning the declaration or complaint.—Attachment, as hereinbefore shown,[1] is sometimes a primary action and sometimes an ancillary proceeding, and furthermore, being wholly a creation of statute in each state, no uniform proceeding has been prescribed for bringing the matters to an issue and trial. In some states an issue is joined on the affidavit, in others a declaration is required to be filed subsequent to the commencement of suit by writ of attachment, in the same manner as when a suit is begun by writ of summons; and in other states both the function of an affidavit and a declaration are performed by a complaint previously filed. For these reasons general rules can not be stated in a work of this scope. The practice is too multifarious. We can only urge upon the practitioner the necessity of thoroughly learning the nature of the action of attachment in his own particular state and applying legal principles to his practice. If attachment is there a primary action the whole case—the debt or demand as well as the grounds for attachment and regularity when questioned—

1. *Ante*, §§ 2–9.

must be brought before the court in the manner prescribed by the statute; and if it is there considered to be a proceeding in aid of the principal suit, then the main action must receive the same attention it would require if no attachment was pending, while the attachment must be cared for as a distinct collateral proceeding to be brought to an issue and tried according to the local statute and practice. No effort is here made to indicate what is to be done in any case, but attention to local rules is urged and a few decisions of local value are here subtended as notes.[1]

1. *Necessity of separate statement of cause of action.*—The Missouri statute contemplates, in actions before justices of the peace, that a separate statement of a cause shall be made and filed, but such practice is not essential to jurisdiction. If the affidavit states a cause of action the court will have jurisdiction. Holman *v.* Kerr, 44 Mo. App. 481.

Complaint is necessary in Arkansas, but it may be embodied in the affidavit, although it should be separate. Sannoner *v.* Jacobson, 47 Ark. 31, 14 S. W. Rep. 458; Lehman *v.* Lowman, 50 Ark. 444, 8 S. W. Rep. 187.

Contents of declaration or complaint.—The declaration need not recite the issue and levy of an attachment when they are already a part of the record. Bell *v.* Hobbs, Ga. Dec., Part II, 144.

The declaration will be construed in connection with the attachment papers when it refers distinctly to them. It will be sufficient if it describes the suit as pending in the court, and returnable to a certain term thereof, although it contains no special prayer for judgment. King *v.* Thompson, 59 Ga. 380. See, as to sufficiency in Connecticut, Jones *v.* Gilbert, 13 Conn. 507.

Must not be a variance.—Allegation as a ground for attachment "that the defendant fraudulently incurred the debt for which suit is brought" in the affidavit, and alleging a breach of warranty in the declaration, has been held not to be a variance. Hambrick *v.* Wilkins, 65 Miss. 18, 3 So. Rep. 67.

Annexing declaration to process.—The old practice in Georgia required the declaration to be annexed to the process. Scarborough *v.* Hall, 67 Ga. 576. But the present practice does not. Sutton *v.* Gunn, 86 Ga. 652, 12 S. E. Rep. 979.

When declaration to be filed.—In Georgia, the declaration must be filed at the return term of the writ. Russell *v.* Faulkner, 89 Ga. 818, 15 S. E. Rep. 756; Jaffray *v.* Purtell, 66 Ga. 226.

In Alabama, it must be filed "within the first three days of the return term." Perkerson *v.* Snodgrass, 85 Ala. 137, 4 So. Rep. 752.

In Michigan, it must be filed within twenty days after the return of the writ; but the failure so to do is at most an irregularity which can only be taken advantage of by entry of default before it is subsequently filed, because the irregularity is cured by filing the declaration before default is taken. Smith *v.* Runnells, 54 N. W. Rep. 375, 94 Mich. 617.

In Pennsylvania, it may be filed in foreign attachment at the third term after commencement of suit, and must

§ 442. (b) **Concerning entry and notice of appearance.**— How far an appearance of the defendant constitutes a waiver of irregularities, in the prior proceedings, has been hereinbefore considered.[1] The practitioner will avoid a "general appearance" and make only a "special appearance," if he desires to take advantage of such irregularities, but an appearance will not be a waiver of jurisdictional defects; such objections may be raised on a collateral proceeding. The necessity for the entry of an appearance of the defendant, in any case in which there has been a valid service of the writ in an attachment suit, is to prevent the plaintiff from obtaining a default judgment, and from then applying the property to the satisfaction of his pretended demand without any defense being made by the defendant.

In some courts the filing or entry of an appearance is not of itself sufficient; but the defendant must also give the plaintiff notice that such appearance has been filed or entered.[2]

be filed more than fifteen days prior to the entry of judgment. Lane *v.* White, 140 Pa. St. 99, 21 Atl. Rep. 437.

Under one statute a declaration could be filed within a year and day, and preserve the lien of the first attaching creditor, unless a second attaching creditor should have, after two months, a rule upon him to declare, and if he then make default the second attached could *non pros* him. Stephen *v.* Thayer, 2 Bay. (S. C.) 272; M'Bride *v.* Floyd, 2 Bailey L. (S. C.) 209, 213.

Parties to be named in the declaration. —In an attachment against a member of a copartnership for a copartnership debt, the declaration need not be against both partners. Connon *v.* Dunlap, 64 Ga. 680.

When an attachment against a husband on a debt not due, the declaration is against both husband and wife, a default judgment thereon must be set aside as to the wife, for as against her the suit is premature, and only allowed against the husband because of special statute. Terry *v.* Curd & Sinton Mfg. Co., 66 Miss. 394, 6 So. Rep. 229.

Amendment of declaration. — After levy, the filing of an amended declaration alleging that the plaintiff sues for the use of another, who has purchased the claim since the levy, will not dissolve the attachment. Epstin *v.* Levenson, 79 Ga. 718, 4 S. E. Rep. 328.

A declaration may be amended after judgment when it describes the defendant as "defendant in attachment," sets out the notice which is the evidence of the debt and alleges that an attachment has been issued theron, and concludes with a prayer for process. Kolb *v.* Cheney, 63 Ga. 688.

1. *Ante*, § 221.

2. A New Jersey statute required an

§ 443. (c) **Concerning an affidavit of merits.**—An "affidavit of merits" or "affidavit of defense" is required to be filed by the defendant in states where attachment is an original action and when such affidavit is required by defendants in other actions. If, when such affidavit is required, it be not filed in compliance with the rules of practice, the plaintiff will be entitled to have default entered, although the defendant may have entered his appearance.[1]

§ 444. (d) **Concerning demurrers.**—The general rules concerning demurrers are equally applicable to an attachment on original process, as to actions begun by writ of summons. Irregularities and insufficiencies appearing on the face of the pleadings of either party may generally be taken advantage of by demurrer by the adverse party before judgment, although the ultimate result be nothing more than the delay necessary to give time for the filing of amended pleadings.[2]

entry of appearance and notice thereof to be given to the plaintiff within twenty days. Both were necessary to affect the plaintiff's right. Regel *v.* Seagraves, 46 N. J. L. 295.

Michigan requires both appearance and notice. As to continuation for thirty days to give opportunity for appearance when there has been no personal service, see How. Stat., § 6846. Churchill *v.* Goldsmith, 64 Mich. 250, 31 N. W. Rep. 187; further, Payment *v.* Church, 38 Mich. 776.

Appearance in attachment not necessarily an appearance in the original suit.—By appearing and traversing the affidavit in attachment is not, where the attachment proceedings are void for want of a writ, an appearance in the original action. Sawyers *v.* Smith, 41 Miss. 554.

An appearance and answer to the merits waives all defects in a service by publication. *Ante*, § 221. And, in Nebraska, this is true after a lapse of five years, where such appearance was to procure the opening of the judgment. Warren *v.* Dick, 17 Neb. 241.

Compulsory appearance.—In Iowa the defendant may be compelled to appear and give information concerning his property, when the necessary facts appear by the plaintiff's affidavit. Lutz *v.* Aylesworth, 66 Iowa 629.

But this is an appearance to give evidence and not to plead. He may be punished by fine for refusing to answer proper questions. Lutz *v.* Aylesworth, 66 Iowa 629.

1. This rule now applies to foreign attachments in Pennsylvania. Praun *v.* Miller, (Pa. Com. Pl.) 3 Pa. Dist. Rep. 536.

But it did not under a prior statute. Grant *v.* Hickcox, 64 Pa. St. 334.

What is a sufficient affidavit of merits in Kansas, see Robinson *v.* Burton, 5 Kan. 293.

2. If the defendant's demurrer is

§ 445. (e) **Concerning pleas in abatement.**—Pleas in abatement are not generally favored because they are merely dilatory pleas and do not raise an issue on the merits of the case. They merely abate the pending suit, in which they are interposed and remit the plaintiff to the commencement of a new suit. Nevertheless, they are still permitted in some states as at common law, while other states endeavor to avoid the delay by putting the "truth of the allegations in the affidavit" in issue on a plea in abatement. A plea in abatement must set out the defect so that the court may judge whether the objection is sustained by it.[1] A plea in abatement "must show a better writ."[2]

not disposed of before judgment it will be error. Posey *v.* Buckner, 3 Mo. 604.

A demurrable defect in a declaration may prove fatal when the attachment is on original process. Third Nat. Bank *v.* Teal, 4 Hughes C. C. 572.

But in Mississippi a variance in the writ and declaration in the statement of the names, number and identity of the plaintiffs, though fatal on demurrer, may be cured by amendment. Ligon *v.* Bishop, 43 Miss. 527.

A variance between the affidavit and complaint can not be taken advantage of by demurrer in Alabama. Odom *v.* Shackleford, 44 Ala. 331.

1. Garner *v.* Johnson, 22 Ala. 494.

2. In Illinois a plea in abatement is proper in attachment cases. Bates *v.* Jenkins, 1 Ill. (Breese) 411.

In Alabama a variance between the cause of action stated in an affidavit for attachment and the cause of action described in the complaint may be taken advantage of by plea in abatement. Wright *v.* Snedecor, 46 Ala. 92.

In Mississippi the truth of the affidavit may be put in issue by a plea in abatement, and when this is done, the jury in trying the issue have as large a scope in estimating the damages as in a suit on the attachment bond. Fleming *v.* Bailey, 44 Miss. 132.

It being necessary in that state that the debt be due, in the case of attachment against non-residents, a plea in abatement alleging that the debt is due will defeat the attachment. Mack *v.* Jacobs, 70 Miss. 429, 12 So. Rep. 444.

Doctrine in Missouri.—A special plea in the nature of a plea in abatement is provided for by the statute, but in order to comply therewith the plea must be verified and must put in issue the truth of the allegations in the affidavit or plead matter in abatement affirmatively. Houston *v.* Woolley, 37 Mo. App. 15; Irwin *v.* Evans, 92 Mo. 472, 4 S. W. Rep. 693. A mere literal traverse of all the facts stated in the affidavit will not be treated as a plea to the merits when it purports to be a plea in abatement. Haseltine *v.* Ausherman, 29 Mo. App. 451. Although it includes a denial of the allegation of indebtedness. Rees *v.* Augustine, 24 Mo. App. 671.

An attorney can make this verified special plea in abatement. Houston *v.* Woolley, 37 Mo. App. 15.

Objection to jurisdiction not waived by

§ 446. (f) Concerning "traverse" "pleas to the merits" or plea in bar of the action.—When a plea in bar of the action is proper to be filed the defendant may (1) "traverse" (deny) generally the whole of the plaintiff's alleged cause of action. This is called pleading the "general issue." (2) He may traverse some material and essential averment in plaintiff's alleged cause of action. (3) He may admit the facts and allege new facts which obviate or repel the legal effect of the plaintiff's cause of action; or (4), he may aver facts which conclude the plaintiff by way of *estoppel* from the recovery sought. The last three ways are called "special pleas."[1]

plea in abatement.—If in an attachment suit in Tennessee a plea in abatement is filed, it will not be a waiver of the defendant's right to object to the jurisdiction of the court. Boon *v.* Rahl, 1 Heisk. (Tenn.) 12.

Plea in abatement not waived by filing answer.—In Tennessee the filing of a plea in abatement denying the alleged ground for attachment is not overruled by filing an answer explaining and denying the facts alleged in the bill. Pigue *v.* Young, 85 Tenn. 263, 1 S. W. Rep. 889. (Attachment in aid of a bill in chancery in Tennessee.)

Amending plea in abatement.—A motion for leave to file an amended plea will be denied when no such plea is presented with the motion and no time is asked in which to prepare it. McFarland *v.* Claypool, 128 Ill. 397, 21 N. E. Rep. 587.

1. Further see any good text-book on pleading and follow the local practice regulating the time for filing, and possibly notice of filing.

Traverse in Mississippi.—A traverse of the grounds for which the attachment issued should contain a simple denial of the cause for attachment as averred in the affidavit. Ross *v.* Fowler, 42 Miss. 293.

But by pleading to the merits of the action by alleging defects in the affidavit the defendant can not deny the sufficiency of the writ, for by pleading to the merits he waives his objections to the writ. Bishop *v.* Fennerty, 46 Miss. 570. The general practice would be to first plead in abatement or interpose a motion to dissolve the attachment. *Ante*, §§ 445 and 326.

Traverse in Wisconsin.—The defendant may interpose a plea to the writ by traversing the averments in the affidavit, although he *has* assigned his property for the benefit of his creditors.—Keith *v.* Armstrong, 65 Wis. 225.

The statute also provides for a special answer on oath traversing the facts alleged as ground for issuing the attachment. Braunsdorf *v.* Fellner, 69 Wis. 334, 34 N. W. Rep. 121.

Time included in the traverse.—Where a fraudulent conveyance "within two years last past" was alleged as ground for attachment a plea verified seventeen days thereafter averring that the defendant "has not within two years last past" fraudulently conveyed his property will not defeat the attachment. Such a plea is fatally defective. McFarland *v.* Claypool, 128 Ill. 397, 21 N. E. Rep. 587.

§ 447. **Plaintiff may continue suit after assignment.**—One who has brought suit in attachment against a debtor, having thereafter assigned the cause of action, may continue the suit in his own name for the benefit of his assignee.[1]

§ 448. **Where jury trials in attachment to be had.**—If, after an attachment is made and the truth of the facts alleged in the affidavit are traversed by a plea to the merits, a jury be demanded to try the issue raised, the trial must be had in the county where the suit is pending.[2]

1. Foster *v.* Goodwin, 82 Ala. 384, 2 So. Rep. 895.

2. Canova *v.* Colby, 16 Fla. 167.

CHAPTER XXI.

JUDGMENT, EXECUTION AND SALE.

§ 449. When judgment to be entered.
450. General personal judgment.
451. Special judgment perfecting lien and condemning property to be sold.
452. Effect of the judgment.
453. Form of the judgment.
454. Execution—When to be issued.
455. Sale and title conveyed thereby.
456. Distribution of proceeds.

§ 449. When judgment to be entered.—Under the London custom[1] a default judgment could be entered after verbal proclamation repeated on successive court days without response, but it was only a judgment *nisi* which remained open for a year and a day, in which time the defendant might appear, enter bail, and plead. This principle of entering a conditional judgment on default is followed in the American states with modification as to time, notice, etc.[2]

In several states, notably New Jersey, Pennsylvania, Delaware, Maryland and Virginia, trustees or auditors are appointed in the case of absconding, concealed, etc., debtors, that they may notify all creditors to present claims to have them audited.[3]

Whatever the statute requires as a precedent to the entry of judgment by default must be strictly complied with, and the default judgment must be made absolute and final in the manner

1. See *Ante*, § 1.

2. Wallace *v.* Forrest, 2 Har & M. (Md.) 261; Watts *v.* Robertson, 4 Hen. & M. (Va.) 442; Colwell *v.* Bank of Steubenville, 2 Ohio 229; Hiller *v.* Lamkin, 54 Miss. 14; Porter *v.* Partee, 7 Humph. (Tenn.) 168; Allen *v.* Brown, 4 Metc. (Ky.) 342.

3. Plum *v.* Lugar, 49 N. J. Law 557, 9 Atl. Rep. 779; Schenck *v.* Griffin, 38 N. J. L. 462; Berry *v.* Callet, 6 N. J. L. (1 Hals.) 179; Brien *v.* Pittman, 12 Leigh. (Va.) 379; Wallace *v.* Forest, 2 Har. & M. (Md.) 261; Dawson *v.* Contee, 22 Md. 27; Stone *v.* Jones, 4 Harr. (Del.) 255.

provided, in order that the property may be subjected to the satisfaction thereof. A judgment entered without a previous strict observance of the requirements of the statute will be a judgment *coram non judice* and void.[1]

No final judgment whatever can be rendered by a court so as to perfect a creditor's lien upon the attached property, unless the debtor has been personally served with summons; or has been personally served with a writ of attachment in lieu of a summons; or has voluntarily appeared; or who has been notified thereof by publication or other means provided by law, and has been allowed the prescribed time thereafter in which he may appear. The fact that the property has been seized on attachment and is deemed to be in court, does not bring the defendant into court so that he may be defaulted for not pleading. Furthermore, his property itself can not be finally submitted to the order of the court so long as the owner lacks the opportunity of having his day in court to defend it.[2]

A final judgment can not be entered in an action against a debtor at suit of a creditor before the demand is due and payable; therefore, although some statutes provide for the *issuance* of an attachment in some cases before the debt is due, final judgment can not be rendered until after the maturity of such demand.[3]

There may be two issues to try. One on the traverse of the ground for attachment and the other on the demand. When such is the case, the issue on the attachment is generally disposed of first; but when judgment is first rendered on the

1. Woolkins *v.* Haid, 49 Mich. 299; Edwards *v.* Toomer, 22 Miss. (14 Smed. & M.) 75; Saffarans *v.* Terry, 20 Miss. 690; Clark *v.* Bryan, 16 Md. 171; Sanborn *v.* Mullen, 77 Md. 480, 26 Atl. Rep. 872; Wescott *v.* Archer, 12 Neb. 345; Davidson *v.* Hackett, 45 Wis. 208; Standifer *v.* Toney, 43 Ala. 70; Jones *v.* Howard, 42 Ala. 483; Penn *v.* Edwards, 42 Ala. 655; Boggess *v.* Gamble, 3 Cold. (Tenn.) 148; Mulley *v.* White, 3 Tenn. Ch. 9.

2. *Ante*, §§ 10, 200, 216, 217.

3. Ware *v.* Todd, 1 Ala. 199; Jaseph *v.* Kronenberger, 120 Ind. 495, 22 N. E. Rep. 301; Miller *v.* Wichita Overall and Shirt Mfg. Co., 53 Kan. 75, 35 Pac. Rep. 799.

A judgment final in form is sometimes entered, together with an order staying the execution, for a sufficient time to enable the debt to mature. Berry *v.* Anderson, 3 Miss. (2 How.) 649.

demand it does not effect the sheriff's custody or right of action for the attached property.[1]

It is readily apparent that there are two kinds of judgments in attachment cases. One which may be entered against the defendant who has been served with process, or who has voluntarily appeared, which is a general personal judgment against him on which any of his property liable to execution may be seized to satisfy the demand; and another which may be entered in cases in which there has been no service or personal appearance, and in which the acts constituting constructive service or notice has been performed in strict compliance with the statute, which judgment is a condemnation of the property seized, to, or toward, the satisfaction of the demand. These will be considered in their order.

§ 450. **General personal judgment.**—In an attachment suit where there has been a personal service upon the defendant or a general personal appearance by him in the action, a general personal judgment is authorized to be entered against the defendant. This judgment will authorize the issuance of an execution not only against the property seized on attachment, but against any other property which is not exempt from seizure.[2] A general judgment in attachment in some states has the effect of condemning the property seized on attachment, or else permits a foreclosure of the lien to follow as a matter of course, without any formal sentence of condemnation contained in the judgment.[3] While in others a general judgment

1. Main *v.* Bell, 33 Wis. 544; *ante*, § 243.

2. Hickson *v.* Brown, 92 Ga. 225, 17 S. E. Rep. 1035; Payne *v.* Witherspoon, 14 B. Mon. (Ky.) 270; Ireland *v.* Weber, 27 Ind. 256; Harlow *v.* Beckle, 1 Blackf. (Ind.) 237; Conn *v.* Caldwell, 6 Ill. (1 Gilman) 531; Holliday *v.* Mansker, 44 Mo. App. 465; Whitman Agricultural Assn. *v.* National Ry. E. & I. Assn., 45 Mo. App. 90; Borum *v.* Reed, 73 Mo. 461; Audenreid *v.* Hull, 45 Mo. App. 202; Sanderson *v.* Taylor, 64 N. H. 97, 7 Atl. Rep. 115; Stewart *v.* Mitchell, 10 Heisk. (66 Tenn.) 488; Coleman *v.* Waters, 13 W. Va. 278; Woodruff *v.* Taylor, 20 Vt. 65.

3. Sale *v.* French, 61 Miss. 170; Van Driver *v.* Buckley, (Miss.) 1 So. Rep. 633; Jones *v.* Hart, 60 Mo. 351; Huxly *v.* Harrold, 62 Mo. 516; Kritzer *v.* Smith, 21 Mo. 296; Wallace *v.* Bogel, 66 Tex. 572; Pitkins *v.* Johnson, (Tex.) 2 S. W. Rep. 459; Merrielles *v.* State Bank 5 Tex. Civ. App. 483, 24 S. W. Rep. 564.

which does not especially order the sale of attached property is a mere personal judgment and releases the attached property.[1] But any property of the debtor may be subjected to an execution issued thereon.[2]

Where there has been personal service or general appearance of the defendant in a suit in which an attachment is made, a judgment *in personam* may be rendered against him, although the attachment itself is dismissed. The process of attachment itself is merely auxiliary and irregularities therein can not affect the judgment on the merits in the action.[3]

A general personal judgment can not be entered in an attachment suit where there has only been service by publication of the notice required by law. The judgment entered in such cases can bind only the property seized on the attachment and if this is not sufficient to satisfy the plaintiff's demand he will be relegated to a subsequent proceeding for the recovery of the residue.[4] And though the property be sufficient to satisfy the demand, yet if judgment be taken in such a case for more than the sum claimed in the affidavit and notice, together with accrued interest, the judgment will be entirely void and the property released.[5] The judgment in an attachment in which the only personal service has been by publication of notice is in effect a judgment *in rem*.[6] This is almost the universal policy of the law, but a few efforts have been made to cause the judgment on statutory notice to be a valid personal judgment,[7] even though the attachment itself be dismissed.[8]

1. Wasson *v.* Cone, 86 Ill. 46; Schieb *v.* Baldwin, 13 Abb. (N. Y.) Pr. 469; 22 How. (N. Y.) Pr. 278; compare Thompson *v.* Culver, 15 Abb. (N. Y.) Pr. 97, 24 How. (N. Y.) Pr. 286; Spencer *v.* Rogers' Locomotive Works, 13 Abb. (N. Y.) Pr. 180.

2. But in Kentucky the effects taken on attachment must be disposed of before other property can be seized on execution. Craig *v.* Saven, Hard. (Ky.) 46.

3. Hendrix *v.* Cawthorn, 71 Ga. 742; Bayersdorfer *v.* Hart, 13 Phila. (Pa.) 192; Carothers *v.* Click, 1 Morr. (Iowa) 54.

4. Banta *v.* Wood, 32 Iowa 469; Massey *v.* Scott, 49 Mo. 278; State *v.* Eddy, (Mont.) 25 Pac. Rep. 1032; Harris *v.* Daugherty, 74 Tex. 1, 11 S. W. Rep. 921; Byers *v.* Brannon, (Tex. Sup.) 19 S. W. Rep. 1091.

5. Forsyth *v.* Warren, 62 Ill. 68; Hichins *v.* Lyon, 35 Ill. 150.

6. *Ante*, § 5.

7. Meyer *v.* Keith, 99 Ala. 519, 13 So. Rep. 500.

8. First Nat. Bank *v.* Ragan, 92 Ga. 333, 18 S. E. Rep. 295.

§ 451. **Special judgment perfecting lien and condemning property to be sold.**—It is a universal principle of law that when a court acquires jurisdiction of the subject-matter, no subsequent error or irregularity will divest it of such jurisdiction. The effect of this rule when applied to attachment cases is that where the attachment plaintiff by his attachment proceedings has brought the property within the jurisdiction of the court, such court has power to apply it toward the satisfaction of a judgment recovered on the plaintiff's demand. This judgment will be valid and binding until reversed on error, or by appeal, or set aside in a direct and appropriate proceeding for that purpose. It can not be vacated collaterally nor can it be questioned at suit of a stranger.[1] Since the court gets jurisdiction over the property from having the same brought within it, it is perfectly clear that where no property has been seized no judgment whatever can be obtained against the defendant.[2] When the property is brought within the jurisdiction of the court by attachment and there has been no personal service or appearance the judgment will be a judgment *in rem* only and not a judgment *in personam*.[3] It is a special judgment *in rem* and will not authorize a general execution to be issued and returned *in personam*.[4] This judgment will bind only the property attached and no execution can further issue against other property of the defendant.[5] Such judgment has no extra territorial effect against the person.[6] And is not evidence against him.[7] Nor is it absolutely final like a judgment *in personam*.[8]

A special judgment of condemnation, or special execution directed against the attached property, or order of sale thereof,

1. Hardin *v.* Lee, 51 Mo. 241; Mickey *v.* Stratton, 5 Sawyer C. Ct. 475; Kellogg *v.* Freeman, 50 Miss. 127.

2. Oliver *v.* Gwin, 17 La. 28.

3. Doolittle *v.* Shelton, 1 Greene, (Iowa) 272; Herber *v.* Abbott, 39 La. Ann. 1112, 3 So. Rep. 259.

4. Gilcreest *v.* Savage, 44 Ill. 56.

5. Churchill *v.* Goldsmith, 64 Mich. 250, 31 N. W. Rep. 187; White *v.* Floyd, Speers (S. C.) Eq. 351; Bates *v.* Delavan, 5 Paige (N. Y.) 299; Rice *v.* McMartin, 39 Conn. 573.

6. Bates *v.* Delavan, 5 Paige (N. Y.) 299.

7. White *v.* Floyd, Speers (S. C.) Eq. 351; Conwell *v.* Thompson, 50 Ill. 329.

8. Kimball *v.* Nicol, 58 Ga. 175.

In this case the defendant subsequently filed a plea in bankruptcy and had the judgment discharged.

should be entered by the court on a verdict sustaining the attachment and finding an indebtedness in favor of the plaintiff, in all cases in which there has not been personal service upon, or general appearance by, the defendant.[1]

§ 452. **Effect of the judgment.**—A general personal judgment in attachment has the same effect as a general judgment in other cases. Any property belonging to the defendant may be seized on execution to satisfy the same, with a restriction in some instances that the personal property seized on attachment be first exhausted to satisfy the judgment as shown above.[2] Such a judgment is a bar to any future recovery upon the same demand. It is not only conclusive on what was actually determined, but also upon every other matter which the parties might have litigated in the case.[3] It concludes all persons to all questions of regularity in the attachment proceedings unless fraud, collusion or want of jurisdiction is shown, and it can not be attacked by subsequent attaching creditors or other strangers.[4] It is evidence of a debt and may be made the basis of a suit in another jurisdiction.[5] But a special judgment

1. McCollem *v.* White, 23 Ind. 43; Harlow *v.* Becktle, 1 Blackf. (Ind.) 237; McNamara *v.* Ellis, 14 Ind. 516; Seawell *v.* Williams, 2 Overt. (Tenn.) 272; Giddings *v.* Squier, 4 Mackey (D. C.) 49; People *v.* Judges, 1 Dougl. (Mich.) 417; Lamont *v.* Cheshire, 6 Lans. (N. Y.) 234; Johnson *v.* Collins, 116 Mass. 392; Stockwell *v.* Silloway, 113 Mass. 382; Foran *v.* Johnson, 58 Md. 144.

In Indiana the usual order upon such a judgment is that so much of the attached property be sold as is necessary to satisfy the judgment, but an order for the sale of the whole property will not be erroneous unless it is made to appear that injustice has been thereby done. Harlow *v.* Becktle, 1 Blackf. (Ind.) 237.

2. *Ante*, § 450.

3. Bates *v.* Spooner, 45 Ind. 489.

4. Rudolh *v.* McDonald, 6 Neb. 163.

5. After judgment, execution and sale of land seized on a foreign attachment it is too late to object that the defendant was not liable to that form of action because of being a resident at the time. Paynter *v.* Taylor, 5 Harr. (Del.) 392.

A judgment in an action of foreign attachment regularly and legally prosecuted in one state against a non-resident debtor, who has obtained judgment in that state against a resident, is a bar to a suit in another state to enforce the judgment which was effected by the attachment. Cochran *v.* Fitch, 1 Sandf. (N.. Y) Ch. 142; Moore *v.* Spackman, 12 Serg. & R. (Pa.) 287.

But where the same person is a member of two firms a judgment against him as a member of one firm

against the property only, when there has been no personal service or general appearance, is no bar to a future action on the same demand when not satisfied.[1] Being obtained without actual notice to the debtor, the debt is not conclusively established.[2] It is not evidence of a debt.[3] No action can be maintained upon it.[4] It has no extra-territorial effect.[5] And it may be attacked by other attaching creditors or strangers.[6]

A judgment sustaining the attachment and subjecting the property to execution perfects the lien created by the attachment, or rather it takes the place of such lien and relates back to the time of the levy;[7] and takes priority over all subsequent attachments, liens or conveyances.[8]

§ 453. **Form of the judgment.**—There is some diversity in the forms of judgments entered in attachment suits in the different states, occasioned by the different positions taken by the different courts regarding the necessity for special judgments, as well as by the different state statutes themselves. In some states where there is both an attachment and personal appearance a general judgment in form as in other cases will be sufficient to hold the property, while in others there must

in an action of foreign attachment is no bar to the collection of a demand owed by the garnishee to the other firm. Lucas *v.* Laws, 27 Pa. St. 211.

1. Bliss *v.* Heasty, 61 Ill. 338.

2. Jackson's Appeal, 2 Grant (Pa.) Cas. 407.

3. Manchester *v.* McKee, 9 Ill. (4 Gilm.) 511; Conwell *v.* Thompson, 50 Ill. 329.

4. Miller *v.* Dungan, 36 N. J. L. 21.

5. Fisher *v.* March, 26 Gratt. (Va.) 765; *ante*, §§ 6 and 451.

6. Meyer *v.* Gage, 65 Iowa 606; Railroad *v.* Todd, 11 Heisk. (Tenn.) 549.

Such a judgment can not be pleaded in bar of a future action on the same demand, except to the extent to which it has satisfied the same. Yourt *v.* Hopkins, 24 Ill. 326.

7. Hill *v.* Baker, 32 Iowa 302; *ante*, §§ 323 and 10.

8. *Ante*, §§ 404 and 412.

Merger in case of prior judgment lien on same demand.—The levy of an execution in attachment upon real estate, during the pendency of a judgment lien, does not constitute a new and distinct lien. It is merged into the judgment lien and does not continue after the judgment lien expires by limitation. Bagley *v.* Ward, 37 Cal. 121.

When a judgment has been already obtained in a prior action by the plaintiff against the defendant for the identical demand it is merged in the superiority of the record security acquired by the judgment. Baxley *v.* Linah, 16 Pa. St. 241.

even then be a condemnation of the attached property, or the judgment will dismiss the attachment lien.[1] Likewise there is no uniformity in the form of the judgment when there has been an attachment without personal service or appearance. It is a universal rule that a judgment in such case will only bind the property, but there is no uniformity of opinion as to what such judgment should be. In some states a judgment general in its terms and personal in form against the defendant is proper, notwithstanding the power of the court can only be exercised over the property of the defendant within its jurisdiction.[2] In others the form of the judgment is the same as in all other suits notwithstanding there has been no personal service or general appearance, but the court can issue only a special execution.[3] And in still others the same effect is attained by a special order of the court directing a sale of the property and describing it particularly.[4] And under such requirement an order of sale of land must particularly describe the part to be sold where it is in separate tracts, and should then only direct a sale of so much as is necessary to satisfy the debt and costs, for it will be erroneous to direct a sale in gross of attached lands which are separated into tracts.[5]

The judgment entered in the attachment suit where the property attached was subject to a prior mortgage lien will be erroneous if it ignores the mortgagee's lien. The judgment should direct the mortgagee's lien to be first satisfied.[6]

1. *Ante*, § 450.

2. Parsons *v.* Paine, 26 Ark. 124; Anderson *v.* Goff, 72 Cal. 65, 13 Pac. Rep. 73; Nagel *v.* Loomis, 33 Neb. 499, 50 N. W. Rep. 441.

3. Young *v.* Campbell, 10 Ill. (5 Gilm.) 80; Clymore *v.* Williams, 77 Ill. 618; Johnson *v.* Holley, 27 Mo. 594.

4. Blatchford *v.* Conover, 40 N. J. Eq. 205; Wilson *v.* Garrick, 72 Ga. 660.

5. McDonald *v.* Red River County Bank, 74 Tex. 539, 12 S. W. Rep. 235; Starks *v.* Curd, 88 Ky. 164, 10 S. W. Rep. 419.

A judgment in the following form has been held as a substantial compliance with the statute, requiring the issuance of a special execution, when there had been no personal service or general appearance: "It is therefore considered by the court, that the plaintiffs recover of the defendant the sum of $368.50, as for their demand and also their costs and charges herein expended; and that they have a special execution on the property attached, to wit, lot No. 9," etc. Johnson *v.* Holley, 27 Mo. 594.

6. Mize *v.* Turner, (Ky.) 22 S. W. Rep. 83.

§ 454. **Execution—When to be issued.**—It is quite general for the state statutes to prescribe that the execution issuing on a judgment in attachment should issue from the court within a specified time (within thirty days is the most common provision), and whatever such prescribed time is must be noted and the execution sued out within such period or the attached property will be released from the lien of the judgment.[1] Under these statutes it is generally sufficient if the execution be delivered to the attaching officer within such time, although no levy be made till after the expiration thereof. But if it is delivered to another officer than the one making the attachment then there must be a demand made upon the attaching officer or a taking of the goods from him within such time.[2] For if no such demand be made upon the officer holding the attached property he may return it to the debtor.[3] When, however, an attachment is made by a sheriff's deputy it is the same as if made by him and the lien is preserved by delivering the execution to the sheriff.[4]

In Alabama, where the attachment is on lands or chattels, the plaintiff may have his election to sue out either a *venditioni exponas* for the sale of the property, or he may sue out an ordinary *fieri facias*. If he sues out the latter it is proper for the clerk to indorse upon it a description of the property attached, etc., and if the property attached can not be secured (because of having been replevied by a third person), it is the duty of the sheriff to levy on other property.[5]

§ 455. **Sale, and title conveyed thereby.**—No effort is here made to indicate how a judicial sale should be made further than to call attention to the need of a strict compliance with

1. Ames *v.* Wentworth, 5 Metc. (Mass.) 294; Stackpole *v.* Hilton, 121 Mass. 449; Beers *v.* Place, 36 Conn. 578; Enos *v.* Brown, 1 D. Chip (Vt.) 280; Clark *v.* Washburn, 9 Vt. 302; Ayer *v.* Jameson, 9 Vt. 363; Collins *v.* Smith, 16 Vt. 9; Claybrook *v.* Wade, 7 Coldw. (Tenn.) 555.

2. Clark *v.* Washburn, 9 Vt. 302; Ayer *v.* Jameson, 9 Vt. 363; Collins *v.* Smith, 16 Vt. 9.

3. *Ante*, § 253.

4. Ayer *v.* Jameson, 9 Vt. 363.

5. Autry *v.* Walters, 46 Ala. 476; Garey *v.* Hines, 8 Ala. 837.

the local statute regarding notice of sale,[1] appraisement of the property if necessary,[2] and all other steps whatsoever. If the sale be not regularly made no title will pass, and the sale will be set aside on motion.[3]

The title conveyed by a regular sale of attached property under an execution issuing upon a judgment in the action is the same as that possessed by the debtor whose property it was.[4] The purchaser acquires all the rights also of the attaching creditor, which gives him superiority over all persons with notice acquiring title or lien after the levy of the attachment.[5] And he will be subjected to the rights of all *bona fide* purchasers without notice. And he will be charged with actual or constructive notice of their rights.[6]

When the attached property is owned by cotenants or part-

1. Hewitt *v.* Durant, 78 Mich. 186, 44 N. W. Rep. 318.

2. Moore *v.* Cutler, 19 Kan. 187.

But mere irregularity in an appraisement will not defeat the purchaser's title. Wheeler *v.* Raymond, 130 Mass. 247.

3. Pardee *v.* Leitch, 6 Lans. (N. Y.) 303; Capehart *v.* Dowery, 10 W. Va. 130.

Absence of proof that a copy of the petition and notice has been mailed to the defendant, or that his residence could not be ascertained, is sufficient to defeat a sale of attached real estate where service was made by publication. Hodson *v.* Tibbetts, 16 Iowa 97.

Under an Arkansas statute the sheriff's deed is evidence "of the legality and regularity of the sale of the land so conveyed until the contrary be made to appear." Webster *v.* Daniel, 47 Ark. 131.

That the notice to the debtor has been given as required by law may be shown by parol evidence, although the return fails to state the fact. Bentley *v.* White, 54 Vt. 564.

4. Under one special statute relating to the filing of *lis pendens* it was held that no greater title was conveyed than the debtor had at the time the judgment was docketed. Lamont *v.* Cheshire, 6 Lans. (N. Y.) 234.

In a judicial sale there is no warranty of title, either express or implied. Neither the officer nor the auctioneer (who is the agent of the officer) has any authority to warrant the article sold. The Monte Allegre, 9 Wheat. 616.

5. Miller *v.* Jamison, 24 N. J. Eq. 41.

6. Actual notice given to the purchaser at a sheriff's sale under attachment is *sufficient* to defeat the purchaser's title, unless the purchasers to whom such notice is given be charged with notice of the attachment at the time of the purchase. McConnell *v.* Kaufman, 5 Wash. St. 686, 32 Pac. Rep. 782.

One purchasing at a sheriff's sale after being notified by an attorney that a prior attachment existed against the property, is not an innocent purchaser against one claiming under such prior attachment. Riordan *v.* Britton, 69 Tex. 198, 7 S. W. Rep. 50.

ners, and has been attached to enforce a demand of one of them only, the interest of such cotenant in the attached property only can be sold.[1] The other cotenant can neither be divested of his title nor of his possession.[2]

When personal property is to be sold it is usually the duty of the sheriff to have it present at the time and place of the sale. But, although it be not present, the purchaser will acquire good title, subject to the possibility of being defeated by an order of the court from which the execution issued, setting it aside.[3]

By the general policy of the law, real estate can not be sold in some states until the attached personal property has been sold.[4]

When tracts of land have been successively attached they should be sold in the order of their attachment, and only so much, or so many, sold as is necessary to satisfy the judgment.[5] But the purchaser at a sale of any attached property will not be prevented from acquiring good title by the fact that more of the attached property was sold than was necessary to satisfy the judgment.

The confirmation of the sale by the court, when the statute requires such confirmation, is a jurisdictional matter and no title will pass until the sale is completed by such confirmation.[6]

Redemption of land sold on execution, issuing on a judgment in attachment, is provided by some statutes in like manner as redemption of land from sale on mortgage foreclosure.[7]

1. Thompson *v.* Baker, 74 Me. 48.

2. *Ante*, §§ 57 and 61.

3. Foster *v.* Mabe, 4 Ala. 402.

4. Camden *v.* Haymond, 9 W. Va. 680.

5. Silvers *v.* Edwards, (Ky.) 7 S. W. Rep. 619.

An equity of redemption has been thought to be susceptible of being sold in separate portions or shares, by an officer upon different executions under particular circumstances. True *v.* Emery, 67 Me. 28.

6. And no action can be maintained for purchaser-money where there has been no such confirmation. Freeman *v.* Watkins, 52 Ark. 446, 13 S. W. Rep. 79.

7. In Arkansas, attached land may be redeemed by the debtor within twelve months after the sale on execution. Beard *v.* Wilson, 52 Ark. 290, 12 S. W. Rep. 567.

§ 456. Distribution of Proceeds.—When attached property is sold on execution issued on the judgment in the attachment suit, the proceeds must be distributed according to the priority of the liens thereon, whether such liens be from simultaneous or successive attachments,[1] or from liens occasioned by other processes or conveyances.[2]

To lay down particular rules regarding either the judgment, the execution, the sale, the title acquired on judicial sale, or the distribution of proceeds thereafter does not properly come within the scope of this work and the practitioner is referred to some special work on each of these subjects.

1. *Ante*, §§ 408, 409.

2. As to the distribution of the proceeds under particular local statutes and under particular circumstances, see State *v.* Young, 40 La. Ann. 203, 3 So. Rep. 722; International Trust Co. *v.* Boardman, 149 Mass. 158, 21 N. E. Rep. 239; Taylor *v.* Thurman, (Tex.) 12 S. W. Rep. 614; Rawles *v.* People, 2 Colo. App. 501, 31 Pac. Rep. 941.

CHAPTER XXII.

REVIEW OF ATTACHMENT PROCEEDINGS.

§ 457. Generally.
458. By supersedeas.
459. By appeal.
460. On writ of error—Bill of exceptions.
461. By bill of review.
462. By writ of *certiorari*.
463. By petition to vacate judgment.
464. By petition to vacate the sale.

§ 457. **Generally.**—Attachment proceedings had in any inferior court are as much subject to review as any other legal proceeding of an inferior tribunal. In a preceding chapter,[1] we treated of "Dissolution of Attachment," but this was a proceeding instituted in the court in which the action was begun, and for the purpose of testing the regularity of the attachment as well as the plaintiff's right to have attachment. It is wholly distinct from a proceeding *not* in the court granting the attachment, but in a court of superior jurisdiction, to *review* the action of the court below in the attachment proceedings. Steps toward obtaining a dissolution of the attachment must necessarily be taken before judgment in the attachment proceedings, because after judgment there is no attachment to have dissolved. The attachment has been merged into the judgment.[2] Proceedings in a superior court, to review the action of the inferior court, can not, as a rule, be instituted until after final judgment has been entered in the court below. It is true that under some circumstances, the court above will, by injunction, restrain the court below from proceeding by a remedy so harsh and so much in disfavor as a writ of attachment. But the injunction is to stop the action in the court below before proceeding to judgment. Being a writ to stop the proceeding it can not be considered a review of such proceeding, and therefore

1. *Ante*, Chapter XV, §§ 326–356. 2. *Ante*, § 452.

needs no mention in this connection. Such irregularities as are by the statute of Jeofails cured by the verdict, must, if questioned at all, be brought to the attention of the court on a proceeding to dissolve the attachment, because no questions regarding the same can be raised thereafter;[1] but the illegality of the proceedings, and such objections as go to the jurisdiction of the court to entertain the attachment suit and pass judgment thereon, may be questioned collaterally and reviewed in a court of superior jurisdiction. It is the general rule that a proceeding to dissolve the attachment will only bring in question the attachment itself, because to consider more would be to try the case upon its merits upon a mere motion.[2] But in a review of attachment proceedings the attention of the court of review may not only be called to the defect in the attachment itself, but as well to the action in the original cause. But it must be remembered that in attachment cases, like in all other cases, discretionary orders and rulings of the court below can not be questioned in a court above. It is only such matters as may properly be termed a final judgment of an inferior court that can be reviewed by a superior court.[3] These principles are so well known as to need no support here by the citation of authorities.

In almost every state the acts of an inferior court, in attachment proceedings, may, in some manner and at some time, be reviewed in a court having revisory or appellate powers.[4] The modes of practice in this regard are so various as to make them inappropriate for consideration here, except by the following brief sections, which are designed more as hints to the possible

1. The question whether an attachment will lie on the contract sued on can not, after a judgment in the attachment suit, be raised by an affidavit of illegality. Craig *v.* Herring, 80 Ga. 709, 6 S. E. Rep. 283.

2. Miller *v.* Chandler, 29 La. Ann. 88.

3. The affidavit filed in the case is a pleading, and as such is brought up to a superior court on the record for review. Goss *v.* Board of Com'rs, 4 Colo. 468.

It is held that after judgment that the *ground for attachment* can not be attacked *collaterally*. Burnett *v.* McCluey, 92 Mo. 320, 4 S. W. Rep. 694.

4. Under one statute in Virginia an absent debtor might, within seven years, appear and petition to have the cause reheard. Rootes *v.* Tompkins, 3 Gratt. (Va.) 98.

procedure, than as guides to the proper procedure. The practitioner must look elsewhere for the rules governing his local practice. A consideration of them is beyond the scope of this work.

§ 458. **By supersedeas.**—In the state of New York before the adoption of the code the supreme court would, upon a showing by affidavit, question the legality of the proceeding pending in the court below and would review the order granting it, and, if it was found to have been illegally granted, award a supersedeas reversing that order, which writ would operate to release the property and authorize the officer to return it to the debtor.[1] The proceeding by supersedeas was final as to the attachment.[2] And when the attachment was found to be regular the court proceeded to hear the cause as on any other process.[3]

Under the code practice in New York the court issuing the attachment inquires into the ground upon which it was issued upon a special motion being filed for that purpose. This is a movement to dissolve the attachment and will be found in the chapter treating on that subject.[4]

An appeal may be also provided by statute by which an appellate court may be brought to review the proceedings of the trial court.

§ 459. **By appeal.**—An appeal may be a competent proceeding to review the action of a court below and test the legality

1. Lenox *v.* Howland, 3 Caines (N. Y.) 257; McQueen *v.* Middletown Mfg. Co., 16 Johns. (N. Y.) 5; *Ex parte* Chipman, 1 Wend. (N. Y.) 66; McCamy *v.* Lawson, 3 Head (Tenn.) 256; McKinley's Case, Col. & Caines' (N. Y.) Cas. 82, 1 Johns. (N. Y.) Cas. 137.

2. Learned *v.* Duval, 3 Johns. (N. Y.) Cas. 141.

3. Field *v.* M'Vickar, 9 Johns. (N. Y.) 130.

When the debtor showed that he had given no ground for attachment, as alleged, or that a settlement of the demand had been made, a supersedeas with costs would be granted. Warner and Phelps's Case, 3 Wend. (N. Y.) 424; Chipman's Case, 1 Wend. (N. Y.) 66; Bunch's Case, 9 Wend. (N. Y.) 473.

But though the debtor was unable to sustain his motion for supersedeas he would not be liable to costs where he had given security according to the statute. *Ex parte* Schuneman, 2 Wend. (N. Y.) 285.

4. *Ante*, Chapter XV, §§ 326-356.

of an attachment sustained in it, or to question the legality of the court in failing to sustain it; and an appeal may also be proper, although there may be some special statutory proceeding to accomplish a like result, when such statute is not exclusive in its terms. No appeal, however, can be taken from any discretionary order in the court below in granting an attachment or in refusing to grant it. On appeal a court can only review a final judgment.[1] A judgment dismissing an attachment or sustaining it may be appealed from.[2] In Iowa an appeal from an order dissolving or sustaining an attachment brings the main case up for review only so far as is necessary for the appellate court to understand and dispose of the question upon which the party has appealed.[3] But in North Carolina, where the parties so agree, on an appeal dismissing an attachment, the court may hear and determine the matter instead of sending it back to the court below.[4] In Minnesota the court will not, on appeal from a judgment upon service of summons by publication against a non-resident having property within the jurisdiction of the court, question the existence of the property. The judgment is conclusive upon that question.[5] In Nebraska the appellate court in reviewing attachment proceedings will not reverse the decision of the court below on the facts, unless it is clearly wrong, where the defendant denied the truth of the affidavit and upon inquiry conflicting affidavits were filed by both parties.[6]

Where an appeal is specially provided for by statute the effects of the appeal will be such as are prescribed by that statute. Under a New York statute an appeal from the judgment of the court below suspended all proceedings thereon and released the property held under the attachment.[7] But an

1. Allender *v.* Fritts, 24 Cal. 447; Gill *v.* Downs, 26 Ala. 670.

Rejecting an answer denying the truth of the affidavit is such error as will sustain an appeal. Fleming *v.* Dorst, 18 Ind. 493.

2. Haviland *v.* Wehle, 11 Abb. (N. Y.) Pr. N. S. 447; Noonan *v.* Pomeroy, 14 Wis. 568.

3. Berry *v.* Gravel, 11 Iowa 135.

4. Cushing *v.* Styron, 104 N. C. 338, 10 S. E. Rep. 258.

5. Stone *v.* Myers, 9 Minn. 303.

6. Johnson *v.* Steele, 23 Neb. 82, 36 N. W. Rep. 358.

7. Keyser *v.* Waterbury, 7 Barb.(N. Y.) 650.

appeal from a judgment vacating the attachment and dismissing the suit would not prevent the same plaintiff from procuring an attachment against the same defendant in a suit in another court on the same cause of action.[1]

Likewise a special statutory appeal can not be taken by another than is indicated by the express words of the statute.[2]

An intervener claiming a right to the property attached or in the proceeds thereof can, when the judgment affects him, appeal in the same manner that other parties could.[3] If the appellate court overrules the decision of the court below refusing to hear the intervention, the appellate court will proceed with the interpleader and should not grant a *procedendo* when there is nothing in the court below upon which to proceed.[4]

An appeal is a proper proceeding from a judgment rendered in garnishment cases, but this subject will receive attention in a subsequent part of this work.[5]

§ 460. **On writ of error—Bill of exceptions.**—No issues presented to and decided by a trial court in attachment can be reviewed on writ of error by a superior court unless the same are made to appear upon the record of the court below.[6] Therefore irregularities and defects in the affidavit and bond made on suing out the writ are not available on writ of error unless an exception has been taken in the lower court by plea in abatement,[7] or by a "bill of exceptions," the purpose of which is to make matters appear of record which without it would not so appear and consequently could not be reviewed.[8]

1. Haviland *v.* Wehle, 11 Abb. (N. Y.) Pr. N. S. 447.

2. Leeds *v.* Mueller, 51 N. J. L. 467, 17 Atl. Rep. 954.

In Virginia an absent defendant can not appeal from a decree rendered against him. He can only avail himself of the remedy provided by statute. Barbee *v.* Pannill, 6 Gratt. (Va.) 442. Further as to appeal in Virginia, see Moore *v.* Holt, 10 Gratt. (Va.) 284; and as to what may be contested therein, see Heffernan *v.* Grymes, 2 Leigh. (Va.) 512.

3. Cabot *v.* Burnham, 28 Vt. 694.

4. Evans *v.* Governor's, etc., Transp. and Min. Co., 5 Jones (N. C.) L. 331.

5. See, *post*, Vol. II, "Garnishment."

6. Hazeltine *v.* Page, 4 Vt. 49; McDaniels *v.* Morton, 34 Vt. 101.

7. Burt *v.* Parish, 9 Ala. 211.

8. As a general rule all objections to the affidavit, bond and writ of attachment, which objections do not relate to jurisdictional defects, must be brought to the attention of the court below that the plaintiff may

Errors to be assigned must have been brought to the attention of the court below, and by it passed upon so that its rulings may be final as to them; for nothing but a final judgment can be reviewed. Where there has been no motion in a court below to dismiss an attachment, the defendant can not assign as error the neglect of the court below to dismiss it.[1] And where there has been no plea or motion to quash the attachment in the court below, the court of errors will not dismiss it, although it reverses the judgment itself for error.[2] However, a writ of error from the Supreme Court of the United States, to reverse a judgment of the state court before execution, discharges an attachment in the original suit; where an act of congress provides that security shall be given by the plaintiff in error, which security is substituted for the attachment.[3]

Furthermore, the record must show that a trial was had and that judgment was entered in the court below or the court above will not review the matters brought up by the bill of exceptions.[4] Nor will the reviewing court overrule a motion made after judgment to strike from the indorsement of the levy upon the writ whatever relates to lands. Such refusal is no ground for error.[5]

The rules governing bills of exceptions and review on writs of error in attachment cases are generally the same as those early known to the common law, and further defined by the statute of Westminster 2d, 13 Edw. I, which was passed in the year 1285.[6] And they have been too frequently stated to need further mention here.

have sufficient opportunity to correct them; and they will be waived if not there objected to. Conklin *v.* Harris, 5 Ala. 213; Miere *v.* Brush, (3 Scam.) 4 Ill. 21; Morris *v.* Trustees, etc., 15 Ill. 266; Bretney *v.* Jones, 1 Greene (Iowa) 366; *ante*, §§ 152, 179, 197, 222 and 238.

But one case holds that an affidavit filed in a case is a pleading and as such is brought up on the record for review by the superior court. Goss *v.* Board of Com'rs, 4 Colo. 468.

1. Frink *v.* King, 4 Ill. (3 Scam.) 144.

2. Thompson *v.* Raymon, 8 Miss. (7 How.) 186.

3. Otis *v.* Warren, 16 Mass. 53.

4. Case *v.* Moore, 21 Ala. 758; Marriott *v.* Lewis, 25 Ala. 332.

5. Cannon *v.* Logan, 5 Port. (Ala.) 77.

6. 2 Reeves History of English Law, 186, 188, 189; 3 Bla. Com. 372.

§ 461. **By bill of review.**—A court of equity has jurisdiction to revise all judgments of courts below, which have been obtained through fraud in the proceedings, or where some palpable and injurious mistake has been made by such inferior court. A bill of review is an appropriate remedy in cases where error is apparent on the face of the decree or for material matter discovered since the decree was entered; and an original bill is properly resorted to where a decree is to be impeached as having been obtained by fraud.[1]

Where there has been a mistake in entering the judgment, a court of equity likewise will grant relief on a writ of review, and will thereupon reverse the judgment entered, or revise it so it will stand as it originally ought to have been.[2]

§ 462. **By writ of certiorari.**—A writ of *certiorari* may be resorted to for the purpose of removing attachment proceedings to a court of superior jurisdiction *when there is some error to be corrected*, but not otherwise.[3] Rules and orders made within the legal discretion of the trial judge can not be reviewed upon *certiorari*.[4] The jurisdiction to review the proceedings in the court below for the purpose of setting them aside is acquired only by the report made, or the *certiorari* returned.[5] Where a person has had a right to appeal, or other remedy at law, and has by neglect lost his opportunity for taking advantage thereof, he

1. Pinkney *v.* Jay, 12 Gill. & J. (Md.) 69.

The proceeding.—Where the defendant is a non-resident the proceedings in the bill must, before decree, be the same as if the *subpœna* had been regularly served. After a decree is entered it can only be revised, according to the established principles of equity, in the same manner as if the defendant had regularly appeared. Pinkney *v.* Jay, 12 Gill. & J. (Md.) 69.

2. Carrique *v.* Bristol Print Works, 8 Metc. (Mass.) 444.

3. Ayres *v.* Bartlet, 14 N. J. L. (2 Green.) 330.

4. Birchfield *v.* Harris, 9 Nev. 382.

Further, as to legal rules regarding such proceedings, see Learned *v.* Duval, 3 Johns. (N. Y.) Cas. 141; *Re* Faulkner, 4 Hill. (N. Y.) 30; Curtis *v.* Steever, 36 N. J. L. 304; Cory *v.* Lewis, 5. N. J. L. (2 South.) 846; Hartshorn *v.* Wilson, 2 Ohio 27; Derrett *v.* Alexander, 25 Ala. 265.

As to the removal to the supreme court by *certiorari* before and after the suing out of a *scire facias* in Pennsylvania, see Walker *v.* Gibbs, 2 Dall. 211, 1 Yeates (Pa.) 255.

5. *Ex parte* Gilbert, 7 Wend. (N. Y.) 490.

can not resort to a writ of *certiorari* thereafter. A writ of *certiorari* is not intended to aid one who, having an adequate remedy at law, has lost it by his own laches.[1]

§ 463. **By petition to vacate judgment.**—In some states where a judgment in attachment (or garnishment) has been erroneously entered, a petition to vacate the same is the proper proceeding when interposed within a proper time.[2]

§ 464. **By petition to vacate the sale.**—Likewise where void attachment proceedings have been had and the property has been sold thereunder, such sale may be properly set aside where the court still has jurisdiction of the attached property. Where it is necessary to have a sale affirmed such sale, if made on illegal proceedings, may be set aside at any time before the confirmation. Until such sale is confirmed the bidder, though he be a third person, has not acquired absolute title thereto.[3]

1. Fagg *v.* Parker, 11 Iowa 18.
2. Corbitt *v.* Pynes, 45 Ala. 258; Underwood *v.* Dollins, 47 Mo. 259; Southern Bank *v.* McDonald, 46 Mo. 31; Post *v.* Bowen, 35 Md. 232; Ingle *v.* McCurry, 1 Heisk. (Tenn.) 26.
3. Abbott *v.* Flagg, 1 Heisk. (Tenn.) 742; Ogg *v.* Leinart, 1 Heisk. (Tenn.) 40.

END VOLUME I.